Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

No. 99-

TERESA ANN WILSON,
Petitioner,

v.

WILLIAM D. CATOE, Director, South Carolina Department of Corrections, and the Attorney General of South Carolina,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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7918

QUESTIONS PRESENTED

1. Where the state supreme court implicitly rejected the state's request to "dismiss" a successive collateral attack on a state prisoner's conviction as a means of demonstrating its application of a procedural bar, and instead summarily "denied" the petition, should the court of appeals have applied the *Harris v. Reed* presumption that the state court had reached the merits of the defendant's claims?

2. Did the attorney retained by petitioner's battering, drug-trafficker husband to represent both of them in plea negotiations and at their joint conspiracy trial labor under an actual conflict of interest?

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The opinion of the Fourth Circuit Court of appeals affirming the denial of habeas relief is reported as *Wilson v. Moore*, 178 F.3d 266 (4th Cir. 1999), and is reprinted in the Appendix to this petition at A-1. . The opinion of the district court denying the petition for writ of habeas corpus is reported at 999 F.Supp. 783 (D.S.C. 1998), and is reprinted in the Appendix to this petition at A-42. The opinion of the South Carolina Supreme Court affirming petitioner's convictions in part is reported as *State v. Wilson*, 433 S.E.2d 864 (S.C. 1993).

JURISDICTION

Petitioner Teresa Wilson, a South Carolina state prisoner, filed a petition for writ of habeas corpus in the United States District Court pursuant to 28 U.S.C. §§ 2241 *et seq.*, alleging that the South Carolina courts had convicted and sentenced her in violation of her federal constitutional rights. The district court denied relief on March 27, 1998, and petitioner filed a notice of appeal on April 15, 1998. On May 18, 1998, the district court granted a certificate of appealability under 28 U.S.C. § 2253(b). The court of appeals affirmed the district court's denial of the petition for writ of habeas corpus on May 25, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment of the United States Constitution, which provides in pertinent part that "[i]n all criminal

prosecutions, the accused shall enjoy the right . . . to have the Asisstance of Counsel for his defence."

It further involves 28 U.S.C §§ 2241 *et seq.*, which in pertinent part provide as follows:

28 U.S.C § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, and justice thereof, the district courts and any circuit judge within their respective jurisdictions . . . .

* * * *

(b) The writ of habeas corpus shall not extend to a prisoner unless–

* * * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States....

28 U.S.C. §2254 State custody; remedies in Federal courts.

* * * *

(d) An application of a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a Sate court, a determination of a factual issue made by a State court shall be presumed to be

correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim . . .

STATEMENT OF FACTS

A. Introduction

The underlying issue in this case is whether petitioner, the chronically battered and traumatized wife of a drug trafficker named Ronald Wilson, validly waived her right to conflict-free representation when she passively accepted the same trial lawyer her then-husband had retained for himself. Despite her subservient role in her husband's drug trafficking operation, she was convicted at a joint trial and is now serving the same mandatory, non-paroleable 25-year sentence as her former husband. In the district court, she offered strong evidence to establish that her purported pre-trial waiver of independent legal representation was invalid because of the effects of her husband's physical battering and psychological domination. Compelling as it is, however, this evidence was not considered by the district court because most of it had only belatedly been presented to the South Carolina state courts. Whether that belated presentation sufficed to permit the district court to review her claim based on all of the relevant evidence is the primary issue now raised by this petition.

B. The state court proceedings

On November 22, 1989, petitioner and her husband, Ronald M. Wilson, were arrested and charged with conspiracy to traffic in cocaine

and marijuana and trafficking in cocaine after a search the previous day uncovered evidence of a drug operation being conducted out of their Richland County home. At a trial held the following May, the state presented witnesses and physical evidence to prove that over a period of several years, Ronald Wilson led a conspiracy to traffic in cocaine and marijuana that reached from his home to Texas and to Florida. The evidence showed that he presided over every aspect of the drug scheme. Petitioner played a subservient and relatively minor supporting role in her husband's drug trafficking operation.

Upon being charged, Mr. Wilson selected and retained a single attorney, Douglas Strickler, to represent both himself and petitioner at their joint trial. Despite the obvious difference in culpability between them--a difference which he knew to be equally obvious to the prosecution, App. 87-8 8, 102--[1]Strickler agreed to represent them jointly in plea negotiations and at trial. At no time before or during this representation did he conduct any inquiry or investigation to determine whether petitioner actually agreed to this arrangement, or whether her assent was mere compliance with the desires of her drug-trafficker husband.

Petitioner formally waived her right to her own lawyer on February 21, 1990, when the trial judge held a pretrial hearing to determine whether she, Mr. Wilson, and two other co-defendants knowingly, intelligently, and voluntarily waived their right to independent counsel. App. 7-22. Present during the hearing were the judge, the

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[1] In references to "App." are to the Appendices in the Court of Appeals.

court reporter, petitioner, Ronald Wilson, Strickler, and the two other jointly-represented co-defendants together with their attorney. After the court informed the four defendants as a group of the risks of joint representation, the following colloquy took place:

THE COURT: What about you, Mr. Wilson, what re your ---

MR. WILSON: I -- we -- I will go ahead -- that's fine with me.

THE COURT: Both of you want to keep the same--

MR. WILSON: Yes, sir.

THE COURT: --- the same lawyer?

MS. WILSON: (Nods head in the affirmative).

THE COURT: --- if you would go ahead, sir, if you choose. And, Mrs. Wilson, I didn't ask you, but you concur with that?

MS. WILSON: Yes, sir.

App. 19-20.

On the basis of this waiver, petitioner proceeded to trial represented by her husband's lawyer. Prior to trial, without discussing the matter privately with petitioner, and without having investigated petitioner's relationship with Ronald Wilson, Strickler refused a plea offer that the prosecution extended to petitioner alone. App. 102-04. He later testified that Ronald Wilson indicated his willingness to plead guilty as charged if the state would accept a plea bargain that would not

require petitioner to serve any time at all. App. 102. The state did offer a plea to a lesser trafficking charge that carried a parole-eligible sentence of between seven and twenty-five years, *Id.*; had this offer been accepted, petitioner might have been eligible for parole within as little as two years. Instead, she stood trial with her husband, and without any factual defense to the charges, App. 89, they were both convicted and sentenced to mandatory 25-year terms.

After the South Carolina Supreme Court affirmed her conspiracy convictions and sentence, *State v. Wilson*, 433 S.E.2d 864 (S.C. 1993),[2] petitioner filed an application for post-conviction relief in state court. Her primary allegation was that Strickler's joint representation denied her the effective assistance of counsel. At the evidentiary hearing conducted on the application, her post-conviction counsel called only her ex-husband and petitioner as witnesses. Petitioner testified that physical beatings by her co-defendant/husband left her unable to assert her own legal interests at the time of her trial. App. 74-77. Although the state court judge signed an order of dismissal prepared by the Attorney General, this order contains no fact-finding regarding the crucial issue of whether petitioner's two-word assent to joint representation was voluntary,[3] and does not even mention

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[2]Although the South Carolina Supreme Court vacated petitioner's trafficking conviction, the court's decision did not affect petitioner's mandatory sentence for the conspiracy convictions.

[3]As noted above, the trial transcript reflects that petitioner's "waiver" consisted of a nod of her head and a single, "Yes, sir," in response to the judge's questions--all in the presence of her husband and his lawyer.

petitioner's testimony concerning the physical abuse that she suffered at the hands of her husband and co-defendant. The relevant portion of the state court's order, in its entirety, reads as follows:

> The Applicant also claims she received ineffective assistance of counsel because her counsel was affected by a conflict of interest because he also represented the Applicant's husband, a co-defendant.
>
> Until a defendant shows that his counsel actively represented conflicting interest, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333, 347 (1980); *see, also, Burger v. Kemp*, 483 U.S. 776, 783, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638, 650 (1987). The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction. *Cuyler*, 446 U.S. at 350, 100 S.Ct. at 1719, 64 L.Ed.2d at 348.
>
> This Court finds that counsel informed the Applicant of the hazards of representing co-defendant's [sic] and received assurance from both the Applicant and her husband that they had no reservations concerning counsel's dual representation. Additionally this Court finds that a status conference was held on February 21, 1990 before the Honorable John Hamilton Smith in which the conflict of interest issue was addressed. This Court finds that the Applicant, at that time, executed a waiver of any conflict of interest claim. This Court finds no deficiency on the part of counsel with respect to this allegation.
>
> App. at 110-11.

C. The "new evidence"

The South Carolina Supreme Court declined to review the denial of post-conviction relief, and petitioner subsequently filed a petition for writ of habeas corpus in the United States District Court.

In support of the petition, petitioner filed several affidavits by relatives, friends and counselors from a battered-women support organization, and a psychological evaluation by Dr. Lois Veronen, an expert on Battered Woman Syndrome. These materials presented a far more detailed picture of the severity and the effects of the battering and psychological domination that characterized Ronald Wilson's relationship with his former wife. They showed that from the time they were engaged to be married in 1983, Ronald Wilson habitually beat, assaulted, and verbally attacked petitioner. His physical and psychological abuse was so severe that it caused her a gradual loss of the capacity to think or act independently of him. Friends and family witnessed this abuse, and recognized that petitioner feared for her life and suffered her husband's abusiveness in isolation. Affidavit of Deborah Gentry, App. 128-35, Affidavit of Rhonda Hammond, App. 136-38, Affidavit of Janice Britt, App. 139-41. Rhonda Hammond's affidavit establishes an especially close connection between Ronald Wilson's chronic abuse and beating of his wife and the purported waiver of her right to conflict-free representation, since it shows that the most severe single episode of violence in their entire marriage occurred less than a week before the 1990 waiver hearing. App. 137-38.

These eyewitness accounts of petitioner's victimization were corroborated by events occurring after her trial. In prison, petitioner was referred for therapeutic counseling to Sistercare, a service provider for battered women and their children. The Sistercare counselors' affidavits confirmed the devastating effects of Ronald Wilson's battering on petitioner's capacity to think and act independently. Affidavit of

Elizabeth J. Campbell, App. 142-43, Affidavit of Sally McGuire, App. 144-45.

Additionally, Dr. Veronen, a clinical psychologist specializing in the effects of violence against women, reported that she had diagnosed petitioner as suffering, at the time of trial until the present, from Battered Woman Syndrome--a collection of effects of trauma, helplessness, and self-destructive behavior which characteristically afflict victims of spousal or other domestic abuse. Dr. Veronen's report stated that this psychological condition severely inhibited petitioner's ability to make legal choices and independently participate in her own defense. Report of Dr. Lois J. Veronen, App. 146-55.

The respondents objected to these new affidavits and reports on the grounds that they had never been presented to the state courts. However, while the federal habeas petition was pending in the district court, petitioner returned to state court by filing a habeas corpus petition in the original jurisdiction of the South Carolina Supreme Court. Invoking that Court's state constitutional grant of authority to issue writs of habeas corpus in its original jurisdiction, and a line of recent South Carolina cases indicating the Court's willingness to grant such relief in appropriate situations, *e.g. Butler v. State*, 397 S.E.2d 87 (S.C. 1990), *cert. denied*, 498 U.S. 972 (1990), petitioner urged that the adversarial system had clearly failed to produce a just result in her case, and that the state court should consider all of the extensive evidence bearing on her conflict claim and grant relief.

The state supreme court summarily denied the petition. Subsequently the federal magistrate judge recommended, and the

district court agreed, that none of petitioner's new evidence corroborating her claim of domestic abuse and traumatization could be considered on her conflict-of-interest claim because petitioner's belated presentation of that evidence to the state courts had forfeited her right to federal review. Then, on the basis of the far more limited prior state post-conviction record, the district court denied petitioner's motion for an evidentiary hearing and dismissed the petition. However, the district court did grant petitioner's motion for a Certificate of Appealability, acknowledging arguable merit in her claim that the South Carolina Supreme Court's summary denial of petitioner's second state court petition constituted a merits ruling that had cured any procedural default, and entitled her to full review of the factual submissions in her federal petition.

The court of appeals affirmed. In an opinion that generally tracked the district court decision, the court of appeals held that the state supreme court's summary denial of her second collateral attack on her conviction rested on procedural grounds only, and that when the facts presented to the state post-conviction court were considered alone, habeas relief was not warranted.

ARGUMENT

1. The state supreme court's denial of petitioner's state habeas petition must be regarded as a decision on the merits that removed any procedural bar to federal review.

The central issue in this case is whether the South Carolina Supreme Court's summary denial of petitioner's 1997 habeas petition constituted a decision on the merits of her otherwise defaulted factual

allegations. The evidence on this issue is somewhat in conflict. On the one hand, as the district court and court of appeals correctly noted, South Carolina has procedural rules governing state habeas petitions that might have supported dismissal of her 1997 petition as successive to her PCR application. App. 296-97. On the other hand, as the district court also recognized, the state unsuccessfully urged the state supreme court to "dismiss" rather than "deny" the habeas petition precisely to make clear that the court was enforcing a procedural bar rather than addressing the merits of her petition. The state court's apparent decision not to accept this recommendation both distinguishes this case from *Coleman v. Thompson*, 501 U.S.-722 (1991), and constitutes substantial evidence—albeit unpersuasive to the district court--that the dismissal was on the merits.

In *Harris v. Reed*, 489 U.S. 255, 256 (1989), this Court held that a state court decision shall be deemed to have been rendered on the merits "unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." The South Carolina Supreme Court's decision did no such thing, either "clearly" or by implication. The order, which simply states that the "petition for writ of habeas corpus is denied," nowhere refers to a state procedural bar. It did not do so despite the fact that respondents repeatedly urged the state supreme court to "DISMISS" the petition on procedural grounds, *see* Return to Petition for Writ of Habeas Corpus at App. 212-13 (capitalization and underscoring in original). In that Return, respondents insisted that petitioner wanted the state court to "'deny'" the petition solely as a means of curing her procedural default,

whereas the correct course was to "DISMISS" petition on procedural grounds. *See also id.* at App. 212-18, 219 at n. 4. Respondents apparently sought a dismissal so as to be able to invoke the Court's statement in *Harris v. Reed* that "a state court that wishes to rely on a procedural bar rule in a one-line pro forma order easily can write that 'relief is denied for reasons of procedural default.'" 489 U.S. 266 note 12. The state court's failure to adopt respondents' suggestion implicates *Harris'* corollary that "if the state court under state law chooses not to rely on a procedural bar in such circumstances, then there is no basis for a federal habeas court's refusing to consider the merits of the federal claim." See *Ulster County Court v. Allen*, 442 U.S. 140, 147-154 (1979)." *Id.*

In finding the *Harris* presumption inapplicable to this case, the district court and court of appeals pointed to the threshold requirement of *Coleman v. Thompson* that the presumption applies only "in those cases where a federal court has good reason to question whether there is an adequate and independent state ground for the decision." 501 U.S. at 739. Slip op. at 10. The court of appeals listed several factors to consider in determining whether a summary decision rests on federal grounds, including the presence or absence of an explicit reference to federal law in the state court's decision, whether the state court "dismissed" or "denied" the petition, *see Ylst v. Nunnemaker,* 501 U.S. 797, 802 (1991), and the circumstances surrounding the state court's action, including the availability of a procedural ground for dismissal, or the state court's denial of an evidentiary hearing. Slip op. at 10-11.

The first of these factors obviously sheds no light on the basis

of the state supreme court's action, since it is a simple six-word summary order that cites neither federal nor state law. *Mercadel v. Cain*, ___ F.3d ___, 1999 WL 409655 (5th Cir. 1999). The second factor, however—that the state court "denied" rather than "dismissed" the petition—is telling. As pointed out above, the state's pleadings in this case made much of the difference between dismissal and denial, and emphatically urged the state court to "DISMISS" the petition as a means of expressing the procedural nature of its decision. Had the state court taken the state's advice, the significance of its "dismissal" of the petition would have been obvious. Petitioner submits that the meaning of the state court's decision to reject the state's proposal and "deny" the petition is also clear. At the very least, this feature of the record provides "good reason to question whether there is an adequate and independent state ground for the decision," *Coleman, supra*, 501 U.S. at 739, such that the *Harris* presumption in favor of a merits ruling should apply.

Finally, *Coleman* requires that all of the circumstances surrounding the state court's action be considered. Foremost among these, obviously, is the existence of any clearly-established requirement of state law--whether this requirement is to deny relief on procedural grounds or to proceed to an evaluation of the merits of the federal claim. Petitioner will readily concede that South Carolina law requires that all available claims and grounds for relief be presented in a prisoner's first application for post-conviction relief, and that successive applications will normally be dismissed absent special circumstances. S.C. Code

Ann. § 17-27-90 (1997 Cum. Supp.). *Aice v. State*, 409 S.E.2d 392 (S.C. 1991). Shortly after its denial of petitioner's habeas petition, moreover, the South Carolina Supreme Court abrogated former case law to restrict the availability of habeas corpus in the state's circuit courts to situations not cognizable under the statutory remedy of post-conviction relief. *Simpson v. State*, 495 S.E.2d 429, 431 (S.C. 1998). However, this merging of the habeas corpus remedy with post-conviction relief--even had it occurred in time to affect petitioner's case--did not extend to habeas petitions filed in the original jurisdiction of the South Carolina Supreme Court. As to those cases, the South Carolina Supreme Court continues to maintain an important exception to the normal rules of procedural default involving successive petitions. That Court "has made it abundantly clear that a writ of habeas corpus is still a constitutionally protected and statutorily provided mechanism to address a 'denial of fundamental fairness shocking to the universal sense of justice.'" *State v. Johnston*, 489 S.E.2d 228, 231 (S.C. Ct. App. 1997) (quoting *Pennington v. State*, 441 S.E.2d 315, 316 (S.C. 1994)); *State v. Torrence*, 406 S.E.2d 315, 328 (S.C. 1991) (Toal, J., concurring). Implementing this rule, the South Carolina Supreme Court will grant habeas corpus relief in its original jurisdiction, despite the clear successiveness of the petition, where the petitioner is able to show such a denial of "fundamental fairness." *Butler v. State*, 302 S.C. 466 (1990), *cert. denied*, 498 U.S. 972 (1990). It was this extraordinary remedy that petitioner invoked, and the South Carolina Supreme Court's summary denial of her petition implies a determination that, *on the merits of her Sixth Amendment claim*, she

had failed to show a denial of fundamental fairness. This implication is all the stronger, moreover, in view of the state court's decision to "deny" rather than "dismiss" the petition, in the face of the state's urging to the contrary.

In interpreting the state supreme court's summary order denying the habeas petition in this case, it should be kept in mind that when the South Carolina Supreme Court has chosen in the past to deny habeas corpus claims on procedural grounds rather than on their merits, it has said so. In *Adams v. Moore*, (S.C. Sup. Ct. Aug. 17, 1995), for example, a death row inmate filed a habeas petition under *Butler* after exhausting state and federal post-conviction remedies. Denying relief, the state court noted that several claims had previously been denied on procedural grounds and thus the court declined to "readdress" them.[4]

The court of appeals actually construed the *Adams* order to suggest that the South Carolina Supreme Court uses the words "dismiss" and "deny" interchangeably, because it used the word "denied" in refusing relief, even though a few of the claims raised were rejected on procedural grounds rather than on their merits. This reading of *Adams* is unwarranted, however, since the actual judgment "denying" *Adams*' petition for habeas corpus rested on a series of merits rulings. The true significance of *Adams* is simply that the South Carolina Supreme Court can and frequently does specify procedural bases for its actions in original habeas cases, where such procedural

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[4]The state supreme court's unreported order in *Adams* was made part of the record in the district court, and is reprinted at App. 234-37.

bases actually exist, and this weighs against implying the same meaning from its silence in this case.

That the state court's order denying relief in this case must be regarded as a decision on the merits receives further support from *Woomer v. Evatt* (S.C. Sup. Ct. June 8, 1989). In *Woomer*, the South Carolina Supreme Court entered a summary order virtually identical to the one in this case denying a petition for writ of habeas corpus that had been filed in the Court's original jurisdiction just before the prisoner's scheduled execution. The Attorney General filed a motion for clarification, pointing out that under *Harris v. Reed, supra*, the state supreme court's order would likely be interpreted by the United States Supreme Court as a merits denial. In his motion for clarification, the Attorney General asked the state court to make clear that its order was, in fact, a denial on procedural grounds. The South Carolina Supreme Court refused to do so. True to the Attorney General's prediction, this Court stayed the prisoner's execution, *Woomer v. Evatt*, 491 U.S. 901 (1989), and subsequently denied certiorari only after another case raising the same federal constitutional claim, *Saffle v. Parks*, 494 U.S. 484 (1990), was decided adversely to *Woomer*. *Woomer v. Evatt*, 494 U.S. 1060 (1990).[5]

Nor was *Woomer* the first occasion upon which the summary denial language employed by the South Carolina Supreme Court in this case provided the basis for United States Supreme Court consideration of the merits of a state habeas petitioner's federal claims. In *Yates v.*

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[5]Copies of the relevant orders and pleadings in *Woomer* were made part of the record below. App. 239-44.

Aiken, (S.C. Sup. Ct., May 22, 1985), *vacated and remanded*, 474 U.S. 896, *opinion on remand*, 349 S.E.2d 84 (S.C. 1986), *reversed*, 484 U.S. 211 (1988), *on remand*, 391 S.E.2d 530 (S.C. 1989), *reversed*, 500 U.S. 391 (1991), the prisoner raised an instructional claim by means of a petition for writ of habeas corpus in the South Carolina Supreme Court after failing to litigate the issue at trial, on direct appeal, or in the circuit court during post-conviction relief proceedings. The state supreme court summarily denied the habeas petition in a brief order stating that the petition was denied. That judgment, in turn, was subsequently vacated no fewer than three times by this Court on successive petitions for writs of certiorari, all premised on the recognition that the state court's summary denial was a ruling on Yates' federal constitutional claim. The fact that the state court has chosen to word its denial of the petition in this case essentially as it did in *Yates* provides additional evidence that its ruling both was, and was intended to be, a rejection of the merits of petitioner's Sixth Amendment submission.

Morever, the nature of the South Carolina Supreme Court's "fundamental error" review for habeas petitions in its original jurisdiction indicates that petitioner may have received "merits" review even without "full" review of her claims. That is so because under *Butler*, the state supreme court's determination whether it will entertain a habeas petition in the original jurisdiction turns on a federal due process inquiry--whether "there has been a 'violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice.'" *Butler, supra*, 397 S.E.2d at 88 (emphasis in original, citation omitted). Because this inquiry is itself inextricably intertwined

with federal law, even a decision against entertaining a habeas petition that purported to rest on procedural grounds would imply a merits determination of the non-existence of a fundamental due process violation. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (state procedural default rule did not preclude Supreme Court review because state court excused such default in cases of "fundamental trial error"). Under these circumstances, the reasons why the state supreme court's denial must be deemed a merits ruling are all the more compelling. *Cf. Mercado v. Cain*, *supra* (declining to read the Louisiana Supreme Court's one-word denial of a habeas petition filed in that court as a merits ruling where Louisiana procedure did not permit such filings, and where the state supreme court lacked jurisdiction to entertain such petitions and invariably dismissed them).

In sum, the weight of the evidence supports petitioner's position that the South Carolina Supreme Court evaluated her new evidence on the merits against the "fundamental fairness" standard of *Butler v. State*, and rejected the state's explicit invitation to foreclose federal review by signifying a procedural basis for its decision. Given the ease with which the South Carolina Supreme Court could have invoked a procedural bar as the state urged it to do, it would signify no disrespect to the South Carolina state courts for the federal courts to reach the merits of petitioner's claim based on all of the relevant evidence.

That evidence is unusually compelling. The affidavits and psychological evaluation submitted to the district court--and passed on by the South Carolina Supreme Court when it denied petitioner's habeas petition--show a woman whom South Carolina's criminal justice system,

had it known the facts, would surely have regarded as one of Ronald Wilson's many victims rather than as his partner in crime. The chronic, pervasive physical abuse and psychological domination that characterized petitioner's marriage during the entire time of Ronald Wilson's drug trafficking activities and subsequent trial explains why she had no real choice both in relation to his drug trafficking, and to her acceptance of his lawyer and his legal defense as her own when that drug trafficking was uncovered by the authorities.

However, it was not petitioner's purpose to persuade either the court of appeals or this Court of the legal significance of the Battered Woman Syndrome evidence. That is a task, in the first instance, for the district court. The district court stated that it "cannot review Wilson's new affidavits and psychiatric evidence," and thus its decision to deny the petition in this case did not take any of that evidence into account. Under these circumstances, the proper course for the court of appeals was to remand to the district court so that that court could consider the "new evidence" in the first instance.

Petitioner had requested an evidentiary hearing at which to prove the facts contained in her affidavits and Dr. Veronen's report, and it may be that the district court will find such a hearing to be necessary. However, at this juncture the respondents have neither admitted nor denied the facts alleged in petitioner's submissions, and it may be that no factual dispute will actually materialize. Should the state contravene the factual allegations concerning petitioner's victimization by Ronald Wilson, she will be entitled to an evidentiary hearing, because the allegations are clearly material to her federal constitutional claims

and (for the same reasons that they are not defaulted) she did not "fail[] to develop" them in the state court proceedings. 28 U.S.C. § 2254(e)(2).[6]

2. The court of appeals' erred in concluding--with or without reliance on the "new" evidence---that no actual conflict existed between her interests and those of her battering, dominant co-defendant.

Once the procedural obstacle to consideration of all of petitioner's Battered Woman Syndrome evidence is removed, the gravity of the actual conflict of interest, and the invalidity of petitioner's purported waiver, becomes apparent.

The large majority of drug trafficking cases end in negotiated guilty pleas rather than in jury trials. The obtaining of favorable dispositions by way of guilty pleas is, as a practical matter, at the very core of defense counsel's responsibilities in such cases. Had petitioner been represented by independent counsel, her lawyer unquestionably would have explored this alternative far more vigorously than did Strickler. The practical difficulty for Strickler, however, was that any but the most perfunctory exploration of petitioner's plea-bargaining alternatives would have required an inquiry into the true nature of petitioner's relationship with Ronald Wilson. Such an inquiry, in turn,

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[6]But for the state supreme court's merits ruling on her second collateral challenge to her conviction, respondents might have a basis for asserting that petitioner had indeed "failed to develop the factual basis of [her] claim" within the meaning of § 2254(e)(2). However, to the extent that these facts were ultimately both presented to and implicitly ruled on by the South Carolina Supreme Court, the requirement of § 2254(e)(2) is satisfied.

would have revealed a saga of chronic physical abuse and psychological domination that likely would have radically altered both the prosecution's view of petitioner's position in Ronald Wilson's drug trafficking operation, and the nature of the plea offer extended to her. No lawyer who had discharged this fundamental responsibility of a criminal defense attorney would have concluded, as did Strickler, that "going down with the ship" was a plausible—let alone the best—alternative for Teresa Wilson to have pursued. But Strickler's duty of loyalty to Ronald Wilson foreclosed this avenue of inquiry, and placed beyond reach petitioner's most promising line of defense for avoiding the mandatory 25-year nonparoleable sentence that she is now serving.

The court of appeals nevertheless concluded that no "actual" conflict of interest existed between petitioner and the co-defendant who was threatening and battering her at the time of both the offenses and the trial. Part of the basis of this determination was the erroneous conclusion, discussed above, that the abundant corroboration of petitioner's Battered Woman Syndrome claim was procedurally defaulted and unavailable for consideration by the district court. But even accepting that invalid premise, the unelaborated state post-conviction record suffices to establish both that Strickler labored under an actual conflict of interest between the interests of his two clients, that his representation of Ronald Wilson "adversely affected" his representation of Teresa. *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and the court of appeals was wrong to conclude otherwise.

Central to the lower courts' rejection of petitioner's conflict claim is Strickler's testimony that petitioner (and her husband) would

not accept any plea offer that required her to serve any jail time. Slip op. at 22. For independent counsel aware of petitioner's true status as a battered and psychologically dependent victim of Ronald Wilson, the client's unrealistic goal would not have ended the question of plea negotiations. Rather, independent counsel would have sought to obtain a better plea offer from the state, while at the same time counseling the client on the advantages of co-operating against her husband, and the gravity of the risks that she ran by continuing to make her own interests subservient to his.

There is no question that the dampening of plea negotiations before trial can stem from an "actual conflict" and can represent an "adverse effect" on counsel's performance as those terms are used in *Cuyler*. Thus, in *Holloway v. Arkansas*, 435 U.S. 475 (1978), the Court cited failure to plea bargain effectively as an example of the type of lapse in the defense that might be attributable to a conflict of interest:

> For example, in this case [the joint representation] may well have precluded defense counsel for Campbell from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable.

See also, *Mannhalt v. Reed*, 847 F.2d 576, 582 (9th Cir.) ("Exploring possible plea negotiations is an important part of providing adequate representation of a criminal client, and this part is easily precluded by a conflict of interest."), *cert. denied*, 488 U.S. 908 (1988).

With these principles in mind, it becomes clear that the district court and the court of appeals should not have analyzed the effect of

the conflict on the plea negotiations from the static perspective of Strickler himself. Because Strickler did not and could not have explored the reality behind petitioner's apparent participation in her battering husband's drug operation, he was not in any position to advocate on her behalf for a better plea offer than the 7-25 year offer initially extended. And even if such a better offer could not have been obtained, a minimal investigation into petitioner's situation would have likely produced a sentence at the low end of the 7-25 range--a fact that in turn might have been useful to counsel in persuading his client to take a more realistic view of her options. Disregarding the myriad possibilities that independent representation would have opened up for petitioner, the lower courts have in effect concluded that no actual conflict affected Strickler's pretrial representation because "they" (i.e. petitioner in concert with her husband) were not inclined to accept the first plea offer that the government extended to Strickler.

It should be stressed, moreover, that petitioner need not prove that a better offer *would* have been forthcoming, or that she would have accepted it, had she been represented by a lawyer of undivided loyalties. This Court rejected such an outcome-determinative test in *Cuyler,* requiring a defendant to show instead only that counsel's representation was actually and adversely affected by the conflict. 446 U.S. at 349-50. Thus, it is enough in this situation that Strickler would have pursued a negotiated disposition more vigorously, either with the government, with petitioner herself, or with both, had the reasons for doing so not been placed beyond his reach by his simultaneous representation of Ronald Wilson.

In such a situation, *Cuyler* forbids the placement of the heavy burden of proving a different outcome on a defendant alleging a denial of effective assistance due to counsel's divided loyalties. Under *Cuyler*, it is enough that independent counsel would almost certainly have probed petitioner's relationship with Ronald Wilson, and based on what would have been revealed, the conduct of her defense, including pretrial negotiations, would have been very different. Strickler's duty of loyalty of Ronald Wilson foreclosed all of that, leaving him no alternative but to uncritically accede to his two clients' joint response to the state's initial plea offer, and after that he let the matter drop. That, without more, shows an actual conflict that adversely affected petitioner's defense.

Two additional points not mentioned by the district court or the court of appeals bear emphasis. First, while the the district court emphasized Strickler's testimony that petitioner and her husband "were hanging together on this as did everyone else involved in the case," App. 85, 263, 303, Strickler did not testify or suggest that such "hanging together" offered any particularly effective means of presenting a common defense. Rather, he candidly acknowledged that the $10,000 fee paid by Ronald Wilson for representing both himself and petitioner "was the first decent fee I had gotten" in Strickler's first couple of months of private law practice, App. at 97-98, and he left the implication that the desire to receive this fee, rather than any calculation about the advantages of a joint defense, guided his decision to undertake the joint representation. *See Hoffman v. Leeke*, 903 F.2d 280, 284 (4th Cir. 1990) (noting that trial counsel accepted $15,000 for representing each

of two defendants with sharply conflicting interests).

Second, the record shows that even while still under Ronald Wilson's thumb, petitioner conveyed to Strickler that there was some degree of disharmony in the marriage, since he informed the trial judge at her sentencing that petitioner had left Ronald Wilson "on a number of occasions . . . because of the activities that Ronnie has been engaged in." App. 54. The fact that Strickler learned of these marital conflicts and separations even while he was jointly representing both petitioner and her husband, and the fact that petitioner never had a private discussion of her case with Strickler at any time during the proceedings, lend support to her contention that any independent lawyer would have pursued this subject sufficiently to have learned about the battering and psychological domination that characterized her marriage. As a practical matter, petitioner's leaving her husband during the course of his drug trafficking conspiracy would have been tantamount to a withdrawal from the conspiracy, and no competent attorney acting solely in petitioner's interest would have failed to pursue this critical question. Even disregarding the additional proof of petitioner's victimization that was only belatedly presented to the state courts, the state post-conviction record sufficiently establishes this particular adverse effect of the joint representation to warrant habeas relief. Once the additional evidence is added to the calculation, the devastating effect of Strickler's representation of both petitioner and her batterer becomes unmistakably clear.

For the foregoing reasons, respondents cannot establish that the abundant evidence documenting the severity and impact of Ronald

Wilson's battering of his wife would have had no effect on the outcome of her habeas petition, had the district court considered that evidence. Indeed, even if *Cuyler* required petitioner to prove that the result of the state court proceedings would have been different but for her lawyer's conflict of interest, the evidence presented to the district court and to the state supreme court in her 1997 petition would satisfy such a burden. Assuming the truth of the evidence proffered in her 1997 state and federal habeas petitions, the state supreme court's denial of habeas relief even more clearly meets the "unreasonable application" standard of 28 U.S.C. § 2254(d), and the district court on remand should determine the true facts and grant relief.

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

August, 1999

(Cite as: 178 F.3d 266)

Teresa Ann WILSON, Petitioner-Appellant,
v.
Michael MOORE, Commissioner of South Carolina Department of Corrections;
Charles Molony Condon, Attorney General of the State of South Carolina,
Respondents-Appellees.

No. 98-6577.

United States Court of Appeals,
Fourth Circuit.

Argued Jan. 28, 1999.

Decided May 25, 1999.

After her state-court convictions for drug conspiracy were affirmed on direct appeal, 315 S.C. 289, 433 S.E.2d 864, petitioner sought federal habeas corpus relief. State moved for summary judgment. The United States District Court for the District of South Carolina, Henry M. Herlong, Jr., J., 999 F.Supp. 783, granted motion. Petitioner appealed. The Court of Appeals, Traxler, Circuit Judge, held that: (1) federal habeas courts could not consider evidence offered by petitioner for first time in her petitions for federal and state habeas relief; (2) state court's determination that petitioner voluntarily and knowingly waived her right to separate counsel was not unreasonable application of federal law, precluding federal habeas relief; and (3) performance of petitioner's trial counsel was not adversely affected by actual conflict of interest arising from joint representation of petitioner and her husband, and thus did not warrant federal habeas relief.

Affirmed.

[1] HABEAS CORPUS k401
197k401
Federal habeas courts may not consider a claim if a state court disposed

of the claim on adequate and independent state grounds unless the habeas applicant can demonstrate cause and actual prejudice or a fundamental miscarriage of justice. 28 U.S.C.A. § 2254.

[1] HABEAS CORPUS k404
197k404
Federal habeas courts may not consider a claim if a state court disposed of the claim on adequate and independent state grounds unless the habeas applicant can demonstrate cause and actual prejudice or a fundamental miscarriage of justice. 28 U.S.C.A. § 2254.

[1] HABEAS CORPUS k422
197k422
independent
Federal habeas courts may not consider a claim if a state court disposed of the claim on adequate and independent state grounds unless the habeas applicant can demonstrate cause and actual prejudice or a fundamental miscarriage of justice. 28 U.S.C.A. § 2254.

[2] HABEAS CORPUS k431
197k431
Only when the decision of the state court fairly appears to be grounded in federal law must federal habeas court conclusively presume that a state decision does not rest on an independent and adequate state ground, unless the state court's opinion contains a plain statement that its decision rests upon adequate and independent state grounds.

[3] HABEAS CORPUS k422
197k422
In determining whether basis for unexplained state order fairly appears to rest on federal law or on an adequate and independent state ground, and thus whether it operates as procedural bar to federal habeas review, federal habeas courts should look to text of state court's order for clues, in particular whether the state order mentions federal law; also, language used by state court in disposing of claim may suggest basis for order.

[4] HABEAS CORPUS k422
197k422
Federal habeas courts should consider the circumstances surrounding

entry of unexplained state order in determining whether basis for order fairly appears to rest on federal law or on adequate and independent state ground, and thus whether it operates as procedural bar to federal habeas review.

[5] HABEAS CORPUS k423
197k423
In determining whether state court disposed of habeas petitioner's claim on procedural grounds or on the merits, for procedural default purposes, federal habeas courts cannot conclude blindly that the summary "denial" of a state habeas petition always and necessarily means that the state court considered the merits of a claim, regardless of context.

[6] HABEAS CORPUS k447
197k447
of
South Carolina Supreme Court, sitting in its original jurisdiction, will grant a writ of habeas corpus to correct only those infractions which in the setting constitute a denial of fundamental fairness shocking to the universal sense of justice. S.C.Code 1976, § 17-27-20(b).

[7] HABEAS CORPUS k422
197k422
Given circumstances indicating that state Supreme Court did not visit merits of petition for state writ of habeas corpus, its one-sentence order denying petition did not fairly appear to be based on federal law, but rather was premised on adequate and independent state procedural grounds, precluding review by federal habeas court of evidence offered by petitioner for first time in her petitions for federal and state habeas relief; order made no mention of federal law, no basis existed for concluding that "denial" of state petition, rather than "dismissal," indicated that state supreme court reached the merits, state habeas relief was inappropriate, in that petition was simply attempt to file second application for postconviction relief on grounds that could have been raised in initial application, and state sought dismissal of state petition solely on procedural basis. 28 U.S.C.A. § 2254; S.C.Code 1976, §§ 17-27-20(b), 17-27-90.

[7] HABEAS CORPUS k423

197k423

Given circumstances indicating that state Supreme Court did not visit merits of petition for state writ of habeas corpus, its one-sentence order denying petition did not fairly appear to be based on federal law, but rather was premised on adequate and independent state procedural grounds, precluding review by federal habeas court of evidence offered by petitioner for first time in her petitions for federal and state habeas relief; order made no mention of federal law, no basis existed for concluding that "denial" of state petition, rather than "dismissal," indicated that state supreme court reached the merits, state habeas relief was inappropriate, in that petition was simply attempt to file second application for postconviction relief on grounds that could have been raised in initial application, and state sought dismissal of state petition solely on procedural basis. 28 U.S.C.A. § 2254; S.C.Code 1976, §§ 17-27-20(b), 17-27-90.

[8] HABEAS CORPUS k452

197k452

Federal habeas relief is authorized when the state court decision is in square conflict with a Supreme Court precedent which is controlling as to law and fact; in the absence of such controlling precedent, petitioner must demonstrate either that state court's resolution of question of pure law rests upon objectively unreasonable derivation of legal principles from relevant Supreme Court precedents, or that state court's decision rests upon objectively unreasonable application of established principles to new facts. 28 U.S.C.A. § 2254(d)(1, 2).

[9] HABEAS CORPUS k484

197k484

State court's determination that habeas petitioner had voluntarily and knowingly waived her right to separate counsel was not unreasonable application of federal law, precluding federal habeas relief; state court found that counsel had informed petitioner of hazards of dual representation and received assurances from petitioner and her husband that they accepted dual representation, trial court thoroughly explained difficulties of joint representation and urged petitioner and her husband to retain separate counsel, and petitioner indicated her assent to joint representation orally and in writing. 28 U.S.C.A. § 2254(d)(1), (e)(1).

[10] CRIMINAL LAW k641.4(1)
110k641.4(1)
Although a defendant has a Sixth Amendment right to conflict-free counsel, this right may be waived so long as the waiver is knowing, voluntary, and intelligent. U.S.C.A. Const.Amend. 6.

[11] HABEAS CORPUS k487
197k487
Performance of trial counsel for habeas petitioner was not adversely affected by actual conflict of interest arising from joint representation of petitioner and her husband, and thus did not warrant federal habeas relief on grounds of ineffective assistance of counsel; counsel did not fail to pursue plea bargain for petitioner, who rejected offered plea arrangement due to her unrealistic desire to avoid prison sentence, and petitioner and husband did not have antagonistic positions with respect to any factual or legal issues. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254.

[12] HABEAS CORPUS k487
197k487
To establish an ineffective assistance of counsel claim based on a conflict of interest, a federal habeas applicant must first show that an actual conflict of interest exists; inasmuch as joint representation does not amount to a per se constitutional violation, merely demonstrating a potential conflict of interest will not suffice. U.S.C.A. Const.Amend. 6.

[13] CRIMINAL LAW k641.5(3)
110k641.5(3)
An actual conflict of interest exists, as result of dual representation, when the defendants' interests diverge with respect to a material factual or legal issue or to a course of action. U.S.C.A. Const.Amend. 6.

[14] CRIMINAL LAW k641.13(2.1)
110k641.13(2.1)
To establish ineffective assistance of counsel claim based on actual conflict of interest arising out of dual representation, habeas applicant must demonstrate that the conflict of interest adversely affected counsel's performance; this requirement is satisfied if attorney took

action on behalf of one client that was necessarily adverse to defense of other or failed to take action on behalf of one because it would adversely affect the other. U.S.C.A. Const.Amend. 6.

[15] HABEAS CORPUS k487
197k487
Prejudice is presumed, and federal habeas petitioner is entitled to relief on grounds of ineffective assistance of counsel, if petitioner shows both that actual conflict of interest arising from dual representation existed and that conflict adversely affected counsel's performance. U.S.C.A. Const.Amend. 6.

[15] HABEAS CORPUS k703
197k703
Prejudice is presumed, and federal habeas petitioner is entitled to relief on grounds of ineffective assistance of counsel, if petitioner shows both that actual conflict of interest arising from dual representation existed and that conflict adversely affected counsel's performance. U.S.C.A. Const.Amend. 6.

***268** ARGUED: David Isaac Bruck, Columbia, South Carolina, for Appellant. Robert Eugene Bogan, Assistant Attorney General, Columbia, South Carolina, for Appellees. ON BRIEF: Charles M. Condon, Attorney General, John W. McIntosh, Deputy Attorney General, Donald J. Zelenka, Assistant Deputy Attorney General, Columbia, South Carolina, for Appellees.

Before WILKINSON, Chief Judge, TRAXLER, Circuit Judge, and GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.

***269** Affirmed by published opinion. Judge TRAXLER wrote the opinion, in which Chief Judge WILKINSON and Judge GOODWIN joined.

OPINION

TRAXLER, Circuit Judge:

Appellant Teresa Ann Wilson ("Teresa") applied under 28 U.S.C.A. § 2254 (West 1994 & Supp. 1998) for relief from two drug conspiracy convictions in South Carolina state court, asserting that her Sixth Amendment right to counsel was abridged when one lawyer jointly represented her and her husband, and that she did not knowingly waive her right to be represented separately by her own attorney. In rejecting Teresa's arguments, the district court declined to consider belated evidence that she had been suffering the effects of domestic abuse at the time of her prosecution. This evidence, which Teresa contends would show her inability to participate independently in her own defense, was not presented to the state courts during post-conviction relief (PCR) proceedings; however, while her federal habeas application was pending, Teresa included this evidence in a petition for a writ of habeas corpus to the Supreme Court of South Carolina, which denied her petition without explanation in a one-sentence order.

The district court concluded that the South Carolina Supreme Court had disposed of Teresa's habeas petition on state procedural grounds and, therefore, had not considered the evidence. As a result, the district court also refused to consider it, taking into account only the evidence that had been before the state PCR court. Ultimately, the district court rejected Teresa's § 2254 application and granted summary judgment to the State.[1] On appeal, Teresa urges us to find that the South Carolina Supreme Court actually considered this evidence and disposed of her petition on the merits, and she suggests that the appropriate remedy is to return the matter to district court for reconsideration of her claims in light of this evidence.

We hold that the South Carolina Supreme Court rejected Teresa's habeas petition on state procedural grounds and, therefore, did not take into account Teresa's evidence of spousal abuse. Thus, in ruling on her claims for relief under § 2254, the district court properly refused to consider the new evidence. We conclude further that the district court

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[1]The § 2254 application named as respondents Michael Moore, Commissioner, South Carolina Department of Corrections, and Charles M. Condon, Attorney General for the State of South Carolina. For ease of reference, we refer to respondents as "the State."

correctly determined that Teresa's claims were without merit. Accordingly, we affirm.

I.

Teresa and her husband Ronnie Wilson ("Ronnie") were indicted in South Carolina state court on two counts of conspiring to traffic cocaine and marijuana and one substantive trafficking count. They retained a single attorney to represent them at their joint trial. At a pretrial hearing, the trial judge detailed at length the perils of joint representation, and specifically explained the difficulties that could arise when an attorney representing co-defendants attempted to plea bargain.[2] In fact, ***270** the trial judge urged the

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[2]The trial judge read to the Wilsons from a standard waiver form which provided, in part, the following:

> [W]hen one lawyer represents two or more defendants in any case, a lawyer may not be able to represent all of the defendants to the fullest extent of the law. This may create a conflict of interest which could deny one of the defendants the right to effective assistance of counsel. Each defendant has the right to have a lawyer who represents him and only him. And as you know, if you can't afford a lawyer, I will appoint one for you.
>
> . . . . .
>
> This kind of conflict of interest can be dangerous to a defendant in a number of ways. The government might let a defendant who is not as involved as other defendants plead guilty to lesser charges than their other defendants.
>
> J.A. 13-14.

The judge then elaborated on the problems presented by plea negotiations:

> [I]f you have a lawyer who represents more than one defendant, suppose the [State has] offered one of the defendants to enter a plea to a lesser offense or to work out some kind of real good deal with them in exchange for testimony.

Wilsons to retain separate counsel. Nevertheless, Teresa waived her right to separate counsel orally and in writing by signing a waiver form.[3]

Following a jury trial, the Wilsons were convicted on all three counts and sentenced to identical prison terms of twenty-five years. On direct review, the South Carolina Supreme Court affirmed the Wilsons' conspiracy convictions but vacated their substantive trafficking convictions because of a jurisdictional infirmity. See *State v. Wilson*, 315 S.C. 289, 433 S.E.2d 864 (1993).

Teresa then sought post-conviction relief (PCR) in South Carolina Circuit Court. See S.C. Code Ann. §§ 17-27-10 to -160 (Law. Co-op.

> If you have got one lawyer representing two or more people, that lawyer may try to persuade that defendant not to plead guilty in order to protect ... the other person that that lawyer represents.... He might recommend that ... the deal is good, you go ahead and take it ... know[ing] then that that person is going to be testifying against his other client that he has got remaining.
> J.A. 14.

[3]Following the trial court's lengthy comments on the dangers of joint representation, both Teresa and Ronnie indicated their assent:

> THE COURT: What about you, Mr. Wilson, what are your--
> MR. WILSON: I--we--I will go ahead--That's fine with me.
> THE COURT: Both of you want to keep the same--
> MR. WILSON: Yes, sir.
> THE COURT:--the same lawyer?
> MS. WILSON: (Nods head in the affirmative).
>
> . . . . .
>
> THE COURT: ... And, Ms. Wilson, I didn't ask you, but you concur with that?
> MS. WILSON: Yes, sir.

J.A. 19-20.

1985 & Supp. 1998). Primarily, Teresa contended that she was denied her Sixth Amendment right to effective assistance of counsel because her attorney represented both her and Ronnie even though they had disparate legal interests, and that she did not effectively waive her right to separate counsel because the nature of the potential conflict of interest was not adequately explained to her.[4] Teresa never suggested to the PCR court, however, that she was unable to knowingly waive her right to separate counsel because of chronic abuse, i.e., Battered Woman Syndrome (BWS). Subsequently, the PCR court entered a written order denying post-conviction relief. The PCR judge rejected her Sixth Amendment claims, concluding that Teresa had been adequately informed of the problems intrinsic to joint representation but that she had waived her right to separate counsel. Teresa sought review of the PCR court's order of dismissal, but the South Carolina Supreme Court denied Teresa's petition for certiorari.[5]

In April 1997, after obtaining new counsel, Teresa filed a § 2254 application in the district court.[6] She advanced two grounds ***271** for

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[4]Additionally, Teresa argued to the PCR court that her counsel was ineffective for failing to adequately investigate possible defenses, and that she was unlawfully sentenced. She does not press these additional claims before us, however.

[5]During an evidentiary hearing conducted by the PCR court, Teresa testified that she suffered physical abuse by Ronnie, and her PCR counsel argued that the fact that she was a battered spouse "could have been explored in her defense had she had another attorney." J.A. 78. However, she did not suggest to the PCR court that the alleged domestic abuse rendered her unable to voluntarily waive a conflict of interest.

[6] Because Teresa's § 2254 application was filed after the April 24, 1996 enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub.L. No. 104-132, 110 Stat. 1214, the amendments to 28 U.S.C.A. § 2254 effected by the AEDPA apply. See Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); Green v. French, 143 F.3d 865, 868 (4th Cir.1998), cert. denied, --- U.S. ----, 119 S.Ct. 844, 142 L.Ed.2d 698 (1999).

federal habeas relief. First, she contended that she was denied effective assistance of counsel under the Sixth and Fourteenth Amendments because her attorney was hampered by a conflict of interest between Teresa and Ronnie. Teresa claimed that she played a minimal role in Ronnie's drug activities. Because of this perceived gap in culpability between her and Ronnie, Teresa argued that her attorney could not provide adequate joint representation. As a specific example of this alleged conflict of interest, Teresa highlighted a plea offer that the prosecutor extended to Teresa alone in exchange for her testimony. She believes that competent counsel would have recognized that her best interests conflicted with Ronnie's and thus would have advised her to obtain separate counsel. Teresa's second § 2254 claim was that she did not knowingly and voluntarily waive her right to separate counsel because she was suffering the effects of BWS and was unable to assess independently whether it would serve her best interests to retain her own attorney.

In support of her § 2254 application, particularly her second ground for relief, Teresa presented--for the first time--several affidavits attesting to the abuse she allegedly suffered at Ronnie's hands and a psychological report concluding that Teresa suffered from BWS before and during the trial. Thus, Teresa's § 2254 application rested in part on factual allegations that were never presented to the PCR court. It is undisputed that this newly presented evidence was available and could have been developed at the time Teresa filed her PCR application.

Teresa's § 2254 application was referred to a magistrate judge for a recommendation to the district court. After the State moved for summary judgment, the magistrate judge directed the parties to brief the issue of whether the newly submitted affidavits and psychological report could be considered. Before the magistrate judge issued a recommendation, however, Teresa returned to state court and filed a petition for a writ of habeas corpus in the original jurisdiction of the South Carolina Supreme Court. In this petition, Teresa advanced the same two grounds for relief that she raised in her § 2254 application: (1) that she was denied effective assistance of counsel because of the joint representation, and (2) that her "waiver of her right to conflict-free representation was the invalid product of battering, domination and abuse by her co-defendant." J.A. 188. In support of the petition, Teresa submitted

the same affidavits and psychological report that had been submitted for the first time in federal court.[7]

The State moved to dismiss the petition, urging the South Carolina Supreme Court to find that Teresa's claims were procedurally barred under state law. Without requesting that the State formally answer the habeas petition, the South Carolina Supreme Court then summarily denied the petition in a one- sentence order: "Petition for Habeas Corpus is denied." J.A. 221. The magistrate judge thereafter refused to consider the affidavits and the psychological report on BWS and recommended that the district court deny Teresa's § 2254 application.

The district court agreed with the magistrate judge's recommendation that Teresa be denied relief on her § 2254 application and granted summary judgment to the State. See Wilson v. Moore, 999 F.Supp. 783, 793 (D.S.C.1998). With respect to the new factual grounds for relief, the district court concluded that the South Carolina Supreme Court had disposed of *272 Teresa's petition for original habeas on state procedural grounds and thus had not considered the merits of her petition "in light of the new evidence." Id. at 790. Therefore, the district court concluded that because the state courts did not take into account Teresa's additional evidence in denying her collateral relief, it could not consider this evidence in reviewing her § 2254 application.[8] Turning to the merits of her Sixth Amendment claims, the district court held that the PCR court had correctly rejected Teresa's ineffective assistance claim and that Teresa effectively waived her right to separate counsel. See id. at 792-93.

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[7]Teresa's § 2254 application and her habeas petition to the South Carolina Supreme Court in its original jurisdiction were virtually identical. At oral argument, it was established that Teresa petitioned the South Carolina Supreme Court in a last-minute attempt to have the state courts consider the evidence.

[8]The district court also decided that Teresa was not entitled to an evidentiary hearing on this new evidence. See 28 U.S.C.A. § 2254(e)(2)(West Supp. 1998). Teresa does not challenge this conclusion on appeal.

II.

Teresa directs her argument primarily toward the district court's ruling that the South Carolina Supreme Court refused to reach the merits of her habeas petition and, therefore, did not consider her new evidence. Teresa contends that the "denial" language used by the state supreme court in its summary order, and "the practical necessity" of considering the merits in order to decide if it should exercise its original jurisdiction, demonstrate that the court indeed considered the evidence but rejected her federal claims on the merits. Therefore, she argues, there is no procedural impediment to consideration of this newly presented evidence by a federal habeas court. And, she insists, were the court to include the additional affidavits and the psychological evidence in its analysis, "the merit of appellant's Sixth Amendment conflict claim becomes unmistakable." Br. of Appellant at 10.

A.

[1] Federal habeas courts may not consider a § 2254 claim if a state court disposed of the claim on adequate and independent state grounds unless the habeas applicant can demonstrate cause and actual prejudice or a "fundamental miscarriage of justice." *Harris v. Reed*, 489 U.S. 255, 262, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (internal quotation marks omitted). Here, Teresa's claims that she received ineffective assistance of counsel because of a conflict of interest, and that she did not effectively waive her right to separate counsel, were unquestionably presented to the state PCR court, which disposed of the claim on the merits; thus, the district court was obliged to address these claims on the merits.

The question here is whether a federal court may consider evidence submitted in support of a § 2254 application if the state court refused to consider the evidence based on adequate and independent state grounds. In this case, Teresa's evidence that she suffered from BWS was not submitted to the PCR court as a factual basis for her claims. Rather, Teresa presented these allegations to the state court--via a petition for a writ of habeas corpus in the South Carolina Supreme Court--only after she had filed her § 2254 application in the district

court.

The adequate and independent state ground doctrine, which precludes federal habeas courts from considering procedurally defaulted claims, rests on principles of comity; "[i]t concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Coleman v. Thompson*, 501 U.S. 722, 726, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). In the same way, a federal habeas applicant must develop the factual basis for a claim in state court to "accommodate concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum." Keeney v. Tamayo- Reyes, 504 U.S. 1, 8, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992). As the Keeney Court observed, "it is ... ***273** irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim." Id. at 7-8, 112 S.Ct. 1715. Thus, because of these principles of federalism, the Court in Keeney concluded that the same cause-and-prejudice standard analyzed in *Coleman* should apply to factual bases that were not developed in state court as well as to claims that were not cultivated during state proceedings. See Keeney, 504 U.S. at 8-12, 112 S.Ct. 1715. Teresa has made no attempt, however, to demonstrate cause and prejudice for her failure to present this evidence to the state PCR court. See Thomas v. Taylor, 170 F.3d 466, 472 n. 9 (4th Cir.1999).

Accordingly, the district court could only consider this newly presented evidence on summary judgment if the state supreme court disposed of the habeas petition on the merits, which would require consideration of the new evidence. Conversely, if the state supreme court found the petition procedurally barred, and therefore did not consider the new evidence, the district court could not take the new evidence into account when considering Teresa's § 2254 claims. Cf. Ylst v. Nunnemaker, 501 U.S. 797, 801, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) ("State procedural bars are not immortal ... [i]f the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available."). This much the parties agree upon.

B.

[2] We turn, then, to the question of whether the South Carolina Supreme Court, in its original jurisdiction, ruled on the merits of Teresa's habeas petition and, therefore, necessarily considered the new evidence. Although the concept that federal habeas courts may not consider a § 2254 claim if a state court disposed of the claim on adequate and independent state procedural grounds (absent cause and prejudice or a fundamental miscarriage of justice) seems easily grasped, this principle can be difficult to apply when the state court renders an ambiguous order or disposes of the claim in summary fashion. *Harris* addressed this problem by developing a presumption that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Harris*, 489 U.S. at 263, 109 S.Ct. 1038 (internal quotation marks omitted). The presumption developed in *Harris*, however, does not apply unless "it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for the decision." *Coleman*, 501 U.S. at 739, 111 S.Ct. 2546. Therefore, only when the decision of the state court fairly appears to be grounded in federal law must "federal habeas courts ... conclusively presume that a state decision does not rest on an independent and adequate state ground, unless the state court's opinion contains a plain statement that [its] decision rests upon adequate and independent state grounds." Smith v. Dixon, 14 F.3d 956, 962 (4th Cir.1994) (en banc) (internal quotation marks omitted) (alteration in original).

[3][4] The rub comes in attempting to decipher the basis for an unexplained state order, i.e., in deciding whether a state court's summary disposition-- like the one-sentence denial at issue here--"fairly appears" to rest on federal law or on an adequate and independent state ground. Fortunately, there are some general guideposts to direct our inquiry. First, federal habeas courts should simply look to the text of the state court's order for clues, see Skipper v. French, 130 F.3d 603, 611 (4th Cir.1997), in particular whether the state order mentions federal law, see *Coleman*, *274 501 U.S. at 740, 111 S.Ct. 2546; Smith, 14 F.3d at 963-64. Also, the language used by the state court in disposing of the

claim may suggest a basis for the order. See Ylst, 501 U.S. at 802, 111 S.Ct. 2590 (noting the use of "dismissed" rather than "denied" may be instructive). Second, federal habeas courts should consider the circumstances surrounding the entry of the state order. See id., 501 U.S. at 802, 111 S.Ct. 2590; Smith, 14 F.3d at 964-69. For example, the federal habeas court's decision might be informed by examining whether the claims presented to the state court were subject to summary denial on procedural grounds under state law, see Smith, 14 F.3d at 967, or whether the state court refused to conduct an evidentiary hearing, see id. at 968; see also Skipper, 130 F.3d at 611 (noting that it may be helpful to consider the procedural posture of the state decision and the motion papers submitted to the state court).

C.

Guided by these general precepts, we turn to consider whether the South Carolina Supreme Court's one-sentence order denying Teresa's petition for a writ of habeas corpus "fairly appears" to rest on federal law.

1.

The order of the South Carolina Supreme Court makes no mention of federal law. Teresa contends that this omission is not a meaningful clue as to the basis of the decision since the order does not mention state law either. Contrary to Teresa's position, however, the Supreme Court has made clear that the failure to mention federal law supports the conclusion that the state order "fairly appears" to rest on state law, even though the state order does not refer expressly to state law. See *Coleman*, 501 U.S. at 738, 111 S.Ct. 2546 ("It is not necessarily the case that state courts will take pains to provide a clear and express statement of procedural default in all cases."). Actually, it has been readily apparent since *Coleman* that the lack of any mention of federal law is a significant indication that the state order does not rest on federal law. See id. at 740, 111 S.Ct. 2546; Smith, 14 F.3d at 964 ("This failure is extremely significant in view of the importance the Supreme Court has placed on the necessity of a clear indication that federal law controlled the decision prior to applying the *Harris* presumption."); see also Jones v. Jerrison, 20 F.3d 849, 855-56 (8th Cir.1994) (refusing to apply the

Harris presumption to a one-sentence state order because the order did not refer to federal law). Accordingly, we conclude that the failure of the South Carolina Supreme Court to mention federal law strongly supports the conclusion that its decision does not fairly appear to rest on federal law. See *Coleman*, 501 U.S. at 740, 111 S.Ct. 2546; Smith, 14 F.3d at 964 (finding "the failure of the summary order to refer to federal law ... compelling evidence that the summary order does not fairly appear to rest on federal law or to be interwoven with federal law").

2.

Teresa contends that the South Carolina Supreme Court's disposition of her petition--a "denial" rather than a "dismissal"--indicates that the court considered the merits of her petition or, at the least, gives us good cause to question whether the state order was founded upon an adequate and independent state ground.

[5] We first note that although the use of "deny" or "dismiss" by the state court might provide a hint as to the basis for a state court's summary disposition, see Ylst, 501 U.S. at 802, 111 S.Ct. 2590, federal habeas courts are not to conclude blindly that the summary "denial" of a habeas petition always and necessarily means the state court considered the merits of a claim, regardless of context, see Smith, 14 F.3d at 970 (explaining that in light of North Carolina law, the state court's "denial" did not necessarily indicate the state court considered the merits). Context is ***275** important. In *Coleman*, for example, the state supreme court's use of "dismissal" was significant because the order expressly indicated that the court was granting the State's motion to dismiss, which was based solely on procedural grounds. See *Coleman*, 501 U.S. at 740, 111 S.Ct. 2546. Thus, use of "deny" or "dismiss" by the state court does not in and of itself conclusively tell us whether the state court's decision was based on the merits or on a state procedural rule.

Relying on three unpublished orders in which the South Carolina Supreme Court disposed of various habeas petitions, Teresa argues that the South Carolina Supreme Court has been careful to use the term "deny" when rejecting a habeas petition on the merits. We cannot agree. Indeed, one of the very orders upon which Teresa relies, *Adams*

v. Moore, (S.C. Aug. 17, 1995) (unpublished order), illustrates the opposite point--that the South Carolina Supreme Court attaches no particular meaning to the term "deny" as opposed to "dismiss." In the *Adams* order, the court expressly rejected one habeas claim on procedural grounds and the remaining claims on their merits. The court concluded that the habeas petition should be "denied" in its entirety, failing to distinguish between the procedurally barred claim and the claims which were rejected on the merits. See J.A. 234-36.

The second unpublished order of the South Carolina Supreme Court that Teresa relies upon is similar to the order in this case, providing in its entirety, "The petition for writ of habeas corpus is denied." *Woomer v. State*, (S.C. June 8, 1989) (unpublished order); see J.A. 239. However, we do not find the court's use of "denied" particularly telling. The State moved that the court clarify the basis of its order in *Woomer* so as to avoid the effect of the *Harris* presumption. The South Carolina Supreme Court denied the motion. Teresa suggests that the United States Supreme Court subsequently considered the merits of *Woomer's* habeas claims when it stayed the petitioner's execution while his petition for certiorari was pending, see *Woomer v. Evatt*, 491 U.S. 901, 109 S.Ct. 3180, 105 L.Ed.2d 228 (1989) (mem.), but later denied certiorari, see *Woomer v. Evatt*, 494 U.S. 1060, 110 S.Ct. 1535, 108 L.Ed.2d 773 (1990) (mem.). We do not read into the actions of the Supreme Court the meaning which Teresa commends to us. Further, the *Woomer* order was issued prior to the South Carolina Supreme Court's order in *Adams* in which the court "denied" habeas claims on both procedural and substantive grounds. Thus, even if the *Woomer* order was instructive, the South Carolina Supreme Court, since that time, has employed the term "denied" to dispose of claims on both procedural grounds and on the merits.[9]

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[9] Nor are we persuaded by Teresa's reliance on a third unpublished order of the South Carolina Supreme Court, which was reviewed by the United States Supreme Court even though the South Carolina Supreme Court had apparently "denied by summary order" a petition for a writ of habeas corpus in the court's original jurisdiction. See *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84, 85 (1986), rev'd, 484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). It is not apparent from these decisions

We simply cannot discern a pattern in the South Carolina Supreme Court's use of "denied" as opposed to "dismissed" in disposing of habeas petitions on their merits or on state procedural grounds. Accordingly, we do not find the use of "denied" versus "dismissed" particularly instructive, and we reject Teresa's position that it requires the conclusion that her petition was rejected on the merits.

3.

After examining the totality of the circumstances accompanying the entry of the ***276** state order, we conclude that the order fairly appears to rest on state procedural grounds, not federal law. Several considerations lead us to this conclusion.

As an initial matter, it is helpful to understand the nature of the relief Teresa sought when she made her belated return to state court during the course of her federal habeas proceedings. It is clear that Teresa's claims, which presented new factual grounds for relief, would have been barred had they been presented in a successive PCR application. The South Carolina Uniform Post-Conviction Procedure Act requires PCR applicants to present all of their claims and grounds for relief at the same time:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised ... may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

S.C. Code Ann. § 17-27-90 (Law.Co-op.1985). "[A]s long as it was possible to raise the argument in his first PCR application, an applicant

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whether the order mentioned federal law or whether the surrounding circumstances provided guidance in discovering the basis of the order. Moreover, the Supreme Court's initial review of the summary order, see Yates v. Aiken, 474 U.S. 896, 106 S.Ct. 218, 88 L.Ed.2d 218 (1985), occurred prior to both *Harris* and *Coleman*.

may not raise it in a successive application." *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392, 394 (1991). Teresa does not dispute that she did not present the new factual grounds for relief--her alleged BWS--to the PCR court. Therefore, Teresa clearly would be precluded from filing a successive PCR application that included her new grounds for relief.

Aware of the rule against successive PCR applications, Teresa instead sought a writ of habeas corpus from the South Carolina Supreme Court in its original jurisdiction. In South Carolina, the scope of habeas corpus relief has been greatly curtailed by the South Carolina Uniform Post-Conviction Procedure Act, which essentially displaced the relief that was previously available under the common law writ. See S.C. Code Ann. § 17-27-20(b) ("[The Act] comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence."); see also *Simpson v. State*, 329 S.C. 43, 495 S.E.2d 429, 430 (1998). "[A] matter which is cognizable under the Act may not be raised by a petition for a writ of habeas corpus before the circuit or other lower courts." *Simpson*, 495 S.E.2d at 431 (emphasis added).

[6] The South Carolina Supreme Court, however, retains its power under the state constitution to grant a writ of habeas corpus in its original jurisdiction. See id. at 431 n. 4. But, this remedy is available only under the most extra ordinary circumstances. The South Carolina Supreme Court, sitting in its original jurisdiction, will grant a writ of habeas corpus to correct only those infractions which "in the setting, constitute[ ] a denial of fundamental fairness shocking to the universal sense of justice." *Butler v. State*, 302 S.C. 466, 397 S.E.2d 87, 88 (1990) (internal quotation marks omitted) (emphasis in original). At bottom, habeas relief exists in South Carolina for prisoners who, after exhausting all other means of relief, have "been utterly failed by [the] criminal justice system." *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315, 328 (1991) (Toal, J., concurring).

Thus, Teresa sought an extreme remedy from the South Carolina Supreme Court based on grounds she agrees were available during her state PCR proceedings. Nevertheless, she argues that these new grounds for relief were not subject to dismissal on state procedural grounds because, she claims, the South Carolina Supreme Court's

review of habeas petitions under the *Butler* "fundamental fairness" standard necessarily requires a merits determination. According to this argument, habeas petitions invoking the original jurisdiction of the South Carolina Supreme Court are free of procedural strictures and *277 can never be rejected on procedural grounds under any circumstances. The South Carolina Supreme Court, therefore, would always be constrained to get into the merits of any habeas petition filed in the court's original jurisdiction. We think her argument goes too far.

It has long been the case under South Carolina law that habeas corpus "cannot be used as a substitute for appeal or other remedial procedure[s] for the correction of errors of law of which the defendant had an opportunity to avail himself." Tyler v. State, 247 S.C. 34, 145 S.E.2d 434, 436 (1965). Thus, a prisoner may not disguise what is really a PCR application by calling it a habeas petition. See *Simpson*, 495 S.E.2d at 431. This is so because South Carolina, like other jurisdictions, has a strong interest in promoting finality in the criminal justice system and in limiting the stream of attempts at collateral relief in any one case which often are "limited only by the imagination and creativity of skilled attorneys." Aice, 409 S.E.2d at 394. As the South Carolina Supreme Court has explained:

> Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice.

Id. (citing *Butler*, 397 S.E.2d at 87). Therefore, "[h]abeas corpus is available only when other remedies, such as PCR, are inadequate or unavailable." Gibson v. State, 329 S.C. 37, 495 S.E.2d 426, 428 (1998). And, in order to demonstrate that they are not executing an end-run around PCR procedures, state habeas petitioners must generally show that "PCR is unavailable, all other remedies have been exhausted, and the issues raised now could not have been raised in their prior PCR applications." Id. at 429.

Teresa's petition for habeas corpus to the South Carolina Supreme

Court was nothing more than an attempt to file a second PCR application raising grounds for relief which she could have raised in support of her first PCR application. There was nothing extraordinary about the claims she raised in her habeas petition--they were, in fact, identical to the claims she raised to the PCR court. Clearly, Teresa was unable to show that the issues raised in her state habeas petition could not have been raised in her prior PCR application, and therefore habeas relief--an extraordinary remedy--was inappropriate. See id. at 428. Because South Carolina eschews the use of habeas as a belated substitute for a previously denied PCR application--which is certainly what happened here--we conclude that Teresa's habeas petition did not afford the South Carolina Supreme Court the extraordinary reason necessary to exercise its original habeas jurisdiction. The fact that habeas relief was inappropriate is strong evidence that the South Carolina Supreme Court did not consider Teresa's federal claims on the merits.

There are other considerations that bolster our conclusion that the circumstances surrounding the entry of the South Carolina Supreme Court's order suggest a procedural disposition. For one, the State urged the South Carolina Supreme Court to dismiss Teresa's habeas petition solely on procedural grounds. See *Coleman*, 501 U.S. at 740, 111 S.Ct. 2546. The State argued that the claims raised in Teresa's habeas petition were based on factual grounds that could have been advanced in support of her original PCR application and were thus barred as successive under S.C. Code Ann. § 17-27- 90. In essence, the State maintained that Teresa was simply invoking the court's original habeas jurisdiction as a substitute for other available, more appropriate forms of collateral relief under South Carolina law, which she was not permitted to do. The State's return ***278** did not in any way address the merits of the habeas petition.

This is particularly revealing in light of the procedural posture of the petition when it was rejected. The South Carolina Rules of Appellate Procedure provide as follows:

> A party seeking to have the Supreme Court entertain an action in its original jurisdiction (petitioner) shall serve on all other parties (respondents) a petition for original jurisdiction, a complaint setting forth the claim for relief ... and a notice advising each respondent he

> has twenty (20) days from the date of service to serve and file a return to the petition.... Failure of a party to timely file a return may be deemed a consent by that party to the matter being heard in the original jurisdiction.... If the petition is granted, the respondent shall have thirty (30) days to serve and file an answer to the complaint. The Supreme Court may provide for discovery, fact finding and/or a briefing schedule as necessary.

Rule 229(c), SCACR (emphasis added).[10] Thus, a respondent need not even address the merits of a habeas petition unless the court first decides to exercise its original jurisdiction and grants the petition.

Here, the State filed a return to Teresa's petition urging the court not to exercise its original jurisdiction; it did not file an answer to the complaint addressing the merits of her claims. The State specifically noted this fact in its return: "Respondent will assume ... that the Court does not reach the substance and merits of Petitioner's claim unless the Court actually requires Respondent to file an answer and provides for discovery pursuant to Rule 229(c), South Carolina Rules of Appellate Practice." J.A. 219. Because the court did not agree to hear the matter in its original jurisdiction, the State was not required to address the merits of the petition by filing an answer, nor did the court provide for any discovery or fact finding by the litigants. The court did nothing to suggest that it was considering Teresa's claims on their merits. On the contrary, the court's rejection of the petition without requiring a response from the State implies just the opposite--that the court never reached the merits of the petition.

A procedural disposition of Teresa's petition is also consistent with the South Carolina Supreme Court's historical reluctance to exercise its original jurisdiction, especially when there are other potential avenues of relief for the petitioner:

> Although Article V, § 5, of the South Carolina Constitution vests this Court with the authority to issue extraordinary writs and entertain

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[10]Teresa combined her petition for original jurisdiction and the complaint detailing her claims for relief.

actions in its original jurisdiction, this Court's primary function is to act as an appellate court to review appeals from the trial courts.... [T]his Court has indicated it will not entertain matters in its original jurisdiction where the matter can be entertained in the trial courts of this State. Only when there is an extraordinary reason such as a question of significant public interest or an emergency will this Court exercise its original jurisdiction.

Key v. Currie, 305 S.C. 115, 406 S.E.2d 356, 357 (1991); see also Rule 229(a), SCACR ("The Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties."). In view of the fact that Teresa's habeas petition is nothing more than an attempt to revitalize her first PCR claim, we are convinced that the Supreme Court of South Carolina did not take the "extraordinary" step of exercising its original jurisdiction to review her petition on the merits.

***279** [7] In sum, the circumstances surrounding the entry of the state order, coupled with its failure to mention federal law, leave us convinced that the state supreme court did not visit the merits of Teresa's habeas claims. We conclude that the decision of the state court does not "fairly appear" to rest on federal law and, therefore, that the South Carolina Supreme Court's decision was premised on adequate and independent state grounds. It follows that the state court did not consider the evidence of Teresa's alleged BWS. Neither shall we.

III.

[8] Having concluded that the district court correctly refused to consider the evidence of Teresa's alleged BWS, we turn to the merits of her § 2254 application in light of the factual grounds that were presented to the PCR court. Section 2254(d) prohibits federal habeas relief on any claim "adjudicated on the merits in State court proceedings," unless the state court's decision was: (1)"contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2)"based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. § 2254(d)(1)-(2).

Thus, federal habeas relief is authorized under § 2254(d)(1) when the "state court decision is in square conflict with a precedent (supreme court) which is controlling as to law and fact." Green v. French, 143 F.3d 865, 870 (4th Cir.1998), cert. denied, --- U.S. ----, 119 S.Ct. 844, 142 L.Ed.2d 698 (1999). In the absence of such a controlling precedent, the applicant must demonstrate either that "the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant supreme court precedents," or that the state court's decision "rests upon an objectively unreasonable application of established principles to new facts." Id. In essence, "habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." Id.

Teresa asserts two claims in her § 2254 application. First, she raises a claim of ineffective assistance of counsel, contending that her attorney was inhibited by a conflict of interest in light of his joint representation of her and her husband. Second, she claims that she did not knowingly and voluntarily waive her right to separate counsel. In considering these claims, the state PCR court found that Teresa effectively waived her right to separate counsel. Although the PCR court noted that *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), requires a defendant to demonstrate that counsel actively represented conflicting interests in order to establish an ineffective assistance claim, the order of dismissal issued by the PCR court did not expressly determine whether Teresa's counsel had an actual conflict of interest.

The district court concluded that the performance of Teresa's counsel was not hampered by an actual conflict of interest and, therefore, that the PCR court correctly rejected this claim. With respect to the waiver issue, the district court determined that, even if an actual conflict existed, Teresa waived her right to separate counsel.

A.

[9][10] We consider first whether the PCR court's determination that Teresa waived her right to separate counsel rests upon an application of "the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." Green, 143 F.3d at 870. Although a criminal

defendant has a Sixth Amendment right to conflict-free counsel, this right may be waived so long as the waiver is knowing, voluntary, and intelligent. See Gilbert v. Moore, 134 F.3d 642, 653 (4th Cir.) (en banc), cert. denied, --- U.S. ----, 119 *280 S.Ct. 103, 142 L.Ed.2d 82 (1998). After considering the testimony of Teresa and her counsel, the PCR court concluded "that counsel informed the Applicant of the hazards of representing co-defendants and received assurance from both the Applicant and her husband that they had no reservations concerning counsel's dual representation." J.A. 111. Factual findings by the state court are presumptively correct. See 28 U.S.C.A. § 2254(e)(1). Moreover, as detailed above, the record indisputably demonstrates that the state trial judge thoroughly explained the difficulties created by joint representation and even advised the Wilsons to retain separate counsel. In fact, the trial judge even warned the Wilsons to anticipate the possibility that an attorney representing co-defendants might be hampered in attempting to negotiate a plea arrangement, which turned out to be Teresa's chief complaint. Yet, Teresa indicated her assent to the arrangement, both orally and in writing.

It seems quite clear that Teresa's waiver was knowing and intelligent. Prior to signing the waiver form, she was alerted by the trial judge to virtually every latent danger that could arise before or during the course of the trial. The trial judge explained the concept of "conflict of interest" and made the Wilsons aware that one of them could very well end up testifying against the other. Cf. *Hoffman v. Leeke*, 903 F.2d 280, 289 (4th Cir.1990) (finding waiver was not knowing because defendant was never told the meaning of conflict of interest or that his co-defendants might testify against him). In light of the evidence before the PCR court, Teresa has pointed to nothing that indicates her decision to use the same lawyer as her husband was not a knowing and voluntary decision. See Gilbert, 134 F.3d at 653 (noting that the habeas petitioner bears the burden of demonstrating that the waiver was not voluntary).

In view of the factual determination by the PCR court and the lengthy pretrial hearing before the trial judge addressing the waiver issue, we cannot conclude that the PCR court, in holding that Teresa effectively waived separate counsel, applied the relevant precedent in a manner that reasonable jurists would all agree is unreasonable. See Green, 143 F.3d at 870.

B.

[11] Even if we believed the state court unreasonably determined that Teresa waived her right to separate counsel, she would still not be afforded any relief because we agree with the district court that her counsel's performance was not adversely affected by an actual conflict of interest.

[12][13][14][15] In order to establish an ineffective assistance of counsel claim based on a conflict of interest, a federal habeas applicant must first show that an actual conflict of interest exists. See *Cuyler*, 446 U.S. at 348, 100 S.Ct. 1708. Since joint representation does not amount to a per se constitutional violation, merely demonstrating a potential conflict of interest will not suffice. See Gilbert, 134 F.3d at 652. An actual conflict exists when the defendants' "interests diverge[d] with respect to a material factual or legal issue or to a course of action." Id. (internal quotation marks omitted) (alteration in original). Second, the habeas applicant must demonstrate that the conflict of interest adversely affected counsel's performance. See *Cuyler*, 446 U.S. at 350, 100 S.Ct. 1708. The adverse performance requirement is satisfied "if the attorney took action on behalf of one client that was necessarily adverse to the defense of the other or failed to take action on behalf of one because it would adversely affect the other." Williams v. French, 146 F.3d 203, 212 (4th Cir.1998), cert. denied, --- U.S. ----, 119 S.Ct. 1061, 143 L.Ed.2d 66 (1999). Prejudice is presumed and the applicant is entitled to relief, however, if these showings are made. See Gilbert, 134 F.3d at 652.

Because the PCR court made no express determination of whether the Wilsons' trial ***281** counsel labored under an actual conflict of interest--making the basis for its application of federal law to this issue unclear--the district court conducted a de novo review of the issue. See Cardwell v. Greene, 152 F.3d 331, 339 (4th Cir.), cert. denied, --- U.S. ----, 119 S.Ct. 587, 142 L.Ed.2d 491 (1998) (explaining that "the distinction between de novo review and 'reasonableness' review becomes [in]significant" when the state court does not offer any rationale for its ruling).

Teresa argues that an actual conflict became apparent when Teresa was offered a plea bargain of seven to twenty-five years; Ronnie was offered

no such deal. She contends it was clearly in her best interest to pursue a plea arrangement, including the possibility of cooperating against Ronnie. Because of her attorney's duty of loyalty to Ronnie, she claims, this option was not vigorously pursued. However, Teresa's trial counsel provided unrefuted testimony at the PCR hearing that, when he presented Teresa with the plea bargain--which he negotiated with the prosecutor--she and Ronnie both rejected the idea of Teresa receiving any jail time. According to counsel, Ronnie was prepared to plead guilty as long as Teresa would avoid doing a prison sentence. As the district court noted, Teresa's failure to obtain a plea bargain was, in large part, the result of her desire to avoid prison, which was unrealistic in light of the abundant evidence linking her to the drug conspiracy. In any event, we perceive no actual conflict under the circumstances.

Moreover, the testimony during the PCR hearing made clear that Teresa and Ronnie did not have antagonistic positions with respect to any factual or legal issues. Counsel testified that Ronnie consistently maintained the position that Teresa was not involved in the conspiracy; that neither of them had a good factual defense to the conspiracy charges; and that the best defense for both of them was legal in nature.

We conclude that Teresa has not demonstrated that her attorney's performance was adversely affected by an actual conflict, and we therefore reject her claims for federal habeas relief.

IV.

For the foregoing reasons, we conclude that the state courts of South Carolina, in rejecting Teresa's Sixth Amendment claims, did not consider the evidence of her alleged physical abuse. Accordingly, we will not consider it either. Having found her claims to be without merit, we affirm the district court's denial of her § 2254 application.

AFFIRMED

(Cite as: 999 F.Supp. 783)

Teresa Ann WILSON, # 168081, Petitioner,
v.
Michael MOORE, Commissioner of SCDC; and Charles Molony Condon, Attorney General of the State of South Carolina, Respondents.

No. CIV.A. 2:97-1040-20AJ.

United States District Court,
D. South Carolina,
Charleston Division.

March 27, 1998.

Following conviction in state court of drug trafficking, and exhaustion of state direct appellate and postconviction relief procedures, a habeas petition was filed. The District Court, Herlong, Jr., J., accepting the Report and Recommendation of United States Magistrate Judge Robert S. Carr., held that: (1) the South Carolina Supreme Court's cursory denial of postconviction relief was based on state procedural grounds rather than any review of new evidence presented to it, and the new evidence could consequently not be considered by the federal court in its habeas review; (2) joint representation of the petitioner and her husband did not constitute ineffective assistance of counsel; and (3) in any event the defendant waived her right to claim ineffective assistance based upon any conflict of interest.

Petition denied.

*784 David I. Bruck, Columbia, SC, for Petitioner.

Donald J. Zelenka and Robert F. Daley, Jr., Office of the Attorney General, Columbia, SC, for Respondents.

ORDER

HERLONG, District Judge.

This matter is before the court with the Report and Recommendation of the United States Magistrate Judge, made in accordance with 28 U.S.C. § 636(b) and Local Rule 19.02 DSC. [FN1] Teresa Ann Wilson ("Wilson"), a state ***785** prisoner, seeks federal habeas corpus relief pursuant to 28 U.S.C. § 2254. Wilson filed her petition on April 21, 1997. The Respondents filed a motion for summary judgment on June 18, 1997. Wilson responded with a memorandum opposing the motion on August 8, 1997. In his Report and Recommendation, the Honorable Robert S. Carr recommends that the court grant the motion. For the reasons stated below, this court accepts the Magistrate Judge's recommendation and grants the Respondents' motion.

> FN1. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the United States District Court. Mathews v. Weber, 423 U.S. 261, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

I. STATEMENT OF THE FACTS

A. Procedural and Factual Background

The Grand Jury of South Carolina indicted Wilson; her husband, Ronnie Wilson; and several members of the Wilson family on numerous drug-related charges. Wilson and her husband retained Douglas S. Strickler ("Strickler") as their attorney. On May 1, 1990, following a week-long trial, a jury found Wilson and her husband guilty of two counts of conspiring to traffick cocaine and marijuana and one count of the actual trafficking of cocaine. The state court sentenced Wilson and her husband to twenty-five (25) years in prison.

Wilson appealed her conviction and sentence by raising ten separate faults with her criminal trial. [FN2] On July 19, 1993, the Supreme Court of South Carolina affirmed the two conspiracy convictions. See *State v. Wilson*, 315 S.C. 289, 433 S.E.2d 864 (1993). However, the state

court vacated the trafficking conviction because the state grand jury did not have subject matter jurisdiction over that charge. Id. Wilson asked the Supreme Court of South Carolina to rehear the matter. On August 17, 1993, the court denied her request.

> FN2. Wilson's grounds for appeal are summarized as follows: (1) the grand jury did not have jurisdiction to impose one count of her indictment; (2) prosecution of two counts of her indictment violated the "savings clause" of the South Carolina Criminal Code; (3) one count of the indictment was unconstitutionally charged because it did not occur during the time frame of the indictment; (4) two counts of the indictment failed to allege a criminal offense; (5) the indictment unconstitutionally aggregated drug amounts to constitute a "trafficking" charge; (6) two counts of the indictment were prosecuted ex post facto; (7) two counts of her indictment unconstitutionally charged her with the same offense twice; (8) prosecution of one count of the indictment constituted double jeopardy as she had already been convicted of the charges in the count; (9) the sentencing court improperly considered a prior conviction for penalty enhancement when those convictions were part of the charged indictment; (10) the trial court unconstitutionally allowed testimony regarding her possession of firearms.

On October 15, 1993, Wilson filed an application for post-conviction relief ("PCR"), alleging several grounds. Wilson argued that she was unlawfully sentenced, that her counsel was ineffective, and that her counsel operated out of a conflict of interest by representing both her and her husband. On July 20, 1994, Wilson's new counsel amended her PCR application to assert that her right to counsel was violated by Strickler's joint representation of Wilson and her husband at trial. Furthermore, Wilson's amendment stated that she did not knowingly waive her right to separate counsel. The South Carolina PCR court allowed the amendment.

A South Carolina Court of Common Pleas heard Wilson's request for PCR on July 20, 1994, with testimony from both Wilson and Strickler. Wilson testified "concerning the abuse and domination that characterized her marriage before and during trial." (Pet.'s for State Writ of

Habeas Corpus at 12.) Furthermore, Wilson stated that it was this abuse that led her to agree to Strickler's joint representation of her and her husband. On March 31, 1995, the Honorable L. Casey Manning dismissed Wilson's PCR application. [FN3] Wilson notified the PCR court of her *786 intent to appeal its ruling on May 4, 1995. Wilson filed a petition for a writ of certiorari to the Supreme Court of South Carolina based on two issues: (1) the denial of Wilson's right to counsel due to Strickler's joint representation of Wilson and her husband; and (2) the ineffectiveness of her waiver of Strickler's conflict of interest. The Supreme Court of South Carolina denied Wilson's petition on February 22, 1996.

FN3. Judge Manning's decision, in pertinent part, reads:
The Applicant also claims she received ineffective assistance of counsel because her counsel was affected by a conflict of interest because he also represented the Applicant's husband, a co-defendant.
Until a defendant shows that his counsel actively represented conflicting interest, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333, 347 (1980); see also, *Burger v. Kemp*, 483 U.S. 776, 783, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638, 650 (1987). The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction. *Cuyler*, 446 U.S. at 350, 100 S.Ct. at 1719, 64 L.Ed.2d at 348.

This Court finds that counsel informed the Applicant of the hazards of representing co-defendant's and received assurance from both the Applicant and her husband that they had no reservations concerning counsel's dual representation. Additionally this Court finds that a status conference was held on February 21, 1990, before the Honorable John Hamilton Smith in which the conflict of interest issue was addressed. This Court finds that the Applicant, at that time, executed a waiver of any conflict of interest claim. This Court finds no deficiency on the part of counsel with respect to this allegation.
(Pet.'s for State Writ of Habeas Corpus at 14.)

As noted above, Wilson filed the instant petition on April 21, 1997. Attached to her petition were several affidavits and a psychiatric report that had not been submitted to the South Carolina courts. [FN4] On October 2, 1997, after reviewing the Respondents' motion for summary judgment, Magistrate Judge Carr ordered the parties to brief the court on the issue of whether the federal courts could review the newly filed affidavits and psychiatric report. Prior to a ruling by Magistrate Judge Carr, in November of 1997, Wilson filed a petition for a Writ of Habeas Corpus in the original jurisdiction of the Supreme Court of South Carolina seeking its consideration of the new documents. [FN5] The Supreme Court of South Carolina denied this petition on December 22, 1997. Magistrate Judge Carr issued his Report and Recommendation without considering the new evidence, and recommended the denial of Wilson's petition.

> FN4. Wilson obtained affidavits from several friends and family members, including: Deborah Gentry, Rhonda Hammond, Janice Britt, Elizabeth W. Campbell, Sally McGuire. Dr. Lois J. Vernon performed the mental evaluation filed with Wilson's petition. See (Pet. for Habeas Corpus at Exhs. A-G.) The court will collectively refer to these affidavits and medical report as Wilson's "new evidence."

> FN5. The Supreme Court of South Carolina retains a constitutional grant of original jurisdiction to entertain habeas corpus petitions, outside of the statutory PCR proceedings, "when there is an extraordinary reason such as a question of significant public interest or an emergency." Key v. Currie, 305 S.C. 115, 406 S.E.2d 356, 356 (1991); see also *Simpson v. State*, 329 S.C. 43, 495 S.E.2d 429 (1998) (forthcoming published opinion).

B. Grounds for Habeas Corpus Relief

Wilson's federal habeas petition argues for her release based on two related grounds:

> Petitioner was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel because she was represented at trial by the same attorney who also represented her co-defendant husband, and because she did not validly waive her right to conflict-free

representation.

(Pet. for Writ of Habeas Corpus at 6.) Wilson attempts to supplement the facts presented in the underlying state actions with several affidavits and a medical report on her psychiatric and emotional condition. The thrust of Wilson's argument is that she was intimidated into using her husband's trial counsel because of a history of spousal abuse. Though Wilson presented these issues to the state PCR court, she supported them only with her own testimony. The sworn affidavits and psychiatric report attest to Wilson's history and condition as a battered wife.

II. DISCUSSION OF THE LAW

Wilson filed her petition for federal habeas corpus relief in this court on April 21, 1997. As such, the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996 govern the court's resolution of her case. [FN6] Therefore, the court will first present *787 the posture of this case under the AEDPA. The court will then decide the merits of the Respondents' motion.

> FN6. The AEDPA amended 28 U.S.C. § 2254 and altered the disposition of federal habeas corpus cases in several areas. Petitions filed after the April 24, 1996, enactment of the AEDPA fall under the new law. See Lindh v. Murphy, 521 U.S. 320, ----, 117 S.Ct. 2059, 2067, 138 L.Ed.2d 481 (1997).

A. 28 U.S.C. § 2254

Generally, federal courts must deny habeas relief to a state prisoner whose claim was decided on the merits in the state courts. 28 U.S.C. § 2254(d) (1997). Unlike federal habeas corpus analysis under the pre-AEDPA law, "[t]he focus of federal court review is now the state court decision that previously addressed the claims rather than the petitioner's freestanding claims themselves." McLee v. Angelone, 967 F.Supp. 152, 156 (E.D.Va.1997). State prisoners may obtain federal habeas relief if they show the state's decision was: (1) against "clearly established Federal law;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). As stated above, the South Carolina PCR court heard the two related claims that Wilson brings in

the instant action: (1) denial of effective assistance of counsel at trial due to her sharing an attorney with her husband; and (2) an involuntary waiver of her right to conflict-free legal representation. The PCR court dismissed Wilson's claims. The Supreme Court of South Carolina denied her request to review the PCR court's decision. Therefore, Wilson must convince this court that the South Carolina courts failed to properly apply the tenets of federal law or that the state courts' decisions were unreasonable.

Wilson's petition challenges both points under section 2254(d). First, Wilson contends that the decision of the PCR court, and the recommendation of the Magistrate Judge, fail to recognize a clear violation of her federal right to effective assistance of counsel. (Pet.'s Resp. to Mot. for Summ. J. at 1-5; Pet.'s Objs. to the Rep. & Rec. at 6-14.) Furthermore, Wilson charges that the state PCR court and the Magistrate Judge's recommendation are not reasonable under the facts presented to the state courts. (Pet.'s Reply to Resps.' Supp. Mem. of Law at 5-6; Pet.'s Objs. to the Rep. & Rec. at 1-5.) Before the court can consider the merits of Wilson's petition, it must first determine what evidence in support of her claim is properly before this court.

B. Wilson's New Evidence

1. Consideration of new evidence by South Carolina's courts

The court cannot review Wilson's new affidavits and psychiatric evidence. Congress has decided that a federal habeas corpus court must judge the reasonableness of the state court decision "in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2) (emphasis added). The first issue before the court is whether or not the South Carolina courts effectively considered the new affidavits and psychiatric report in denying Wilson's pleas for post-conviction relief. This evidence was never before any South Carolina court until Wilson's petition for a writ of habeas corpus before the Supreme Court of South Carolina last November. Therefore, this court must now determine if the Supreme Court of South Carolina considered the merits of Wilson's claim in light of the new evidence, or whether the court refused to view the new evidence and disposed of her

writ through a state procedural bar.

[1] The Supreme Court of South Carolina's denial of Wilson's petition for a writ of habeas corpus was based on a state procedural bar. This court may not review a state court's decision "if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). In some instances, "there is a presumption in habeas that a state court's dismissal of a petition for collateral relief does not rest on an independent and adequate state ground and that the state court has rejected the petitioner's federal claims on the merits." Nickerson v. Lee, 971 F.2d 1125, 1127 (4th Cir.1992) (referring to presumption created in *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)). However, federal courts must follow the *Harris* presumption " 'only ... in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for the decision.' " ***788** Nickerson, 971 F.2d at 1127 (quoting *Coleman*, 501 U.S. at 739). Thus, the court must decide if good reason exists to question the Supreme Court of South Carolina's summary denial of Wilson's claim.

[2] Fourth Circuit habeas corpus jurisprudence looks to certain factors when determining whether cursory state court rulings are based on state procedural grounds. See Smith v. Dixon, 14 F.3d 956, 963 (4th Cir.), cert. denied, 513 U.S. 841, 115 S.Ct. 129, 130 L.Ed.2d 72 (1994), reh'g denied, 513 U.S. 1105, 115 S.Ct. 785, 130 L.Ed.2d 678 (1995). [FN7] The decision in question by the South Carolina Supreme Court reads: "Petition for Habeas Corpus is denied." (Mag. Judge's Rep. & Rec. at 7 n. 1.) [FN8] If a state court issues an ambiguous, summary ruling, federal courts must examine the nature of the state court's disposition by considering: (1) the absence of a separate, federal reason for the state court's adjudication of the case; (2) whether the state court "dismisses" or "denies" the action; and (3) the circumstances surrounding the entry of the order. Smith, 14 F.3d at 963 (citing *Coleman*, 501 U.S. at 739-40; Ylst v. Nunnemaker, 501 U.S. 797, 802-03, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991)). In the instant case, these factors weigh in favor a procedural disposal of Wilson's state habeas corpus writ.

FN7. The court recognizes that other courts, primarily the

Eastern District of North Carolina, question the authority of the Fourth Circuit's opinion in Smith. See Brooks v. North Carolina Dep't of Correction, 984 F.Supp. 940, 949 (E.D.N.C.1997). Though not noted in the text of Judge Wilkins' opinion, an en banc session of the Fourth Circuit decided Smith and split evenly on the procedural default issue. Smith, 14 F.3d at 982 n. 16. Thus, the ruling does not carry full authoritative weight. See Ashe v. Styles, 39 F.3d 80, 86 n. 4 (4th Cir.1994). However, many courts rely on Smith 's guidance in this intricate area of habeas corpus law. See, e.g., Green v. French, 978 F.Supp. 242, 250 (E.D.N.C.1997); Ward v. French, 989 F.Supp. 752, 759-60 (E.D.N.C.1997) (forthcoming published opinion). Indeed, the Smith opinion highlights the relevant Fourth Circuit case law in this area, especially in light of the United States Supreme Court opinion in *Coleman v. Thompson*. See infra n. 8 (discussion of *Coleman* and its impact on the instant case). The court relies on Smith to shed light on controlling Fourth Circuit precedent in this area of the law.

FN8. Wilson argues that the South Carolina Supreme Court's "denial" of her habeas petition indicates that it considered her new evidence and rendered a decision on the merits, enabling this court to consider the same evidence. (Pet.'s Objs. to the Mag. Judge's Rep. & Rec. at 2.) She asserts that United States Supreme Court precedent requires federal courts to presume that summary denials by state supreme courts were adjudicated on the merits. (Id. at 4-5) (citing *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).) Wilson's argument follows that a state court wishing to dispose of a claim by procedural default, without reaching the merits, will instead "dismiss" the case. (Id. at 4.) Indeed, the Respondents urged the South Carolina Supreme Court to "dismiss" Wilson's petition, rather than "deny" it. (Pet.'s Reply to Resps.' Supp. Mem. of Law at 2.) However, both sides fail to mention that the *Harris* presumption was significantly altered by the Court in *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

The Fourth Circuit has established guidelines for determining

when the *Harris* presumption applies, in light of the *Coleman* decision. In quoting *Coleman*, the Fourth Circuit instructs us that: " 'Per se rules should not be applied ... in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time.' " Smith, 14 F.3d at 963 (quoting *Coleman*, 501 U.S. at 737). Instead, when a state court issues an ambiguous order in a matter involving federal rights, federal courts may conclude the state rested on a state procedural bar after weighing several factors: (1) whether the state order mentions federal law in the summary order; (2) whether the state court "dismisses" or "denies" the action; and (3) whether the circumstances surrounding the entry of the order indicate the state court relied on a state procedural bar. Id. This court looks to these guidelines to determine if the Supreme Court of South Carolina reviewed the merits of Wilson's habeas petition or summarily disposed of her claim by a state procedural bar.

a. Absence of federal law

[3] The absence of a discussion in the South Carolina Supreme Court's decision demonstrates its reliance on state procedural grounds. This court can view this silence as evidence of a decision on the merits only if there is "good reason to question whether there is an independent and adequate state ground for the decision." *Coleman*, 501 U.S. at 739. In *Coleman*, the Court relied heavily on the two facts in determining a state court procedurally dismissed a prisoner's appeal: ***789** (1) that a procedural remedy existed under the state law to dispose of the post-conviction appeal and (2) that the state relied exclusively on this procedural bar in its arguments to the state court. Id. at 740; see Ylst, 501 at 802-03 (1991). These components line up against Wilson.

South Carolina's post-conviction procedural rules provided a way to quash Wilson's state habeas petition. An examination of these rules reveal the likelihood that the state's highest court disposed of Wilson's petition under a procedural precept. Though she attempted to invoke the high court's original jurisdiction, Wilson acknowledges that the PCR procedural rules governed her petition for a state writ of habeas corpus.

(Pet.'s Objs. to the Rep. & Rec. at 5 n. 2) ("[T]raditional procedural default rules applicable to post- conviction relief claims are likewise applicable in habeas corpus proceedings."); see also S.C.Code Ann. § 17-27-30 (1985) (PCR rules should apply to habeas corpus writs in the original jurisdiction of the Supreme Court of South Carolina). South Carolina's rules governing PCR hearings state: "All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application." S.C.Code Ann. § 17-27-90 (1985). Any issue which could have been raised in the initial state PCR action cannot be raised in a second PCR action. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834, 842-43 (1992). A PCR applicant cannot circumvent this rule and file a successive application "on the ground that his first complete PCR application was insufficient due to ineffective PCR counsel." Aice v. State, 305 S.C. 448, 409 S.E.2d 392, 393 (1991). The history of Wilson's case shows that she did not comply with these procedural guidelines.

As detailed above, Wilson argued to the PCR court that the trial attorney's joint representation of her and her husband rendered her counsel ineffective. Wilson testified on her own behalf at the PCR hearing to support these claims. In her state habeas petition, Wilson argued that her PCR counsel did not "present any corroboration of [Wilson's] testimony, even though such corroboration was readily available ...." (State Pet. for Writ of Habeas Corp. at 13.) She now allegedly has this corroboration in her new affidavits and medical report. Wilson's attempt to present this evidence to the Supreme Court of South Carolina is effectually a second PCR application, based on the same claim for ineffective assistance of counsel. She argued that the state court should consider the evidence because her PCR attorney did not do his job the first time. However, as outlined above, South Carolina procedural rules prevent successive PCR applications, even if the PCR counsel was ineffective. See Arnold, 420 S.E.2d at 843; Aice, 409 S.E.2d at 393. Furthermore, the state did not address Wilson's substantive claims in arguing for the Supreme Court of South Carolina to refuse her state habeas petition. (Suppl. Mem. of Law in Supp. of Mot. for Summ. J. at 1.) The state urged the high court to dismiss Wilson's claim without reaching the merits of the case. (Id.) Therefore, it is likely that the state court's denial of Wilson's state habeas petition did not reach the merits of her claim. Instead, the South Carolina

Supreme Court recognized this procedural bar and summarily disposed of her claim.

b. "Denial" v. "Dismissal"

The "denial" by the Supreme Court of South Carolina, rather than a "dismissal," does not evidence its consideration of the merits of Wilson's claim. Wilson argues that a "denial" by a court indicates that the court considered the merits of the claim and refused to grant relief. (Pet.'s Objs. to the Mag. Judge's Rep. & Rec. at 2.) On the other hand, a "dismissal" by a court demonstrates the court relied on some procedural default without analyzing the substance of the claim. (Id. at 4.) Though the *Coleman* court did consider this terminology as evidence, see Ylst, 501 U.S. at 802 (noting "dismissal" of case in *Coleman* was a "clue" for court to use), no bright line rule exists. In Smith, the Fourth Circuit wrestled with a summary "denial" by a Virginia state court. Under the *Coleman* analysis, the Smith court held that the other factors surrounding the state order showed that the state court based its decision on a state procedural bar, despite the "denial" language. Smith, 14 F.3d at 963. Wilson's claim is very similar. Though the South Carolina Supreme Court "denied" ***790** Wilson's habeas petition, the factors surrounding the disposal of her case overwhelmingly point to a state procedural bar.

c. Surrounding circumstances

The unusual posture and timing of Wilson's petition evidence that the South Carolina Supreme Court refused to consider the merits of her claim. "Surrounding circumstances [may] indicate[] that the basis [for a summary state court ruling] was procedural default." Ylst, 501 U.S. at 802. Wilson had already exhausted the standard state post-conviction procedures prior to filing her federal habeas corpus petition. The same claims presented in her federal petition had already been argued before a state PCR court. The PCR court refused to grant Wilson relief from her conviction and the South Carolina Supreme Court refused to review the PCR decision. Wilson, for the first time, submitted the new evidence supporting her claims with her federal petition. Only after the United States Magistrate Judge ordered her and the Respondents to brief the federal court on the admissibility of the new evidence did Wilson request the Supreme Court of South Carolina to take the

extreme measure of exercising its original jurisdiction to grant her a state writ of habeas corpus.

Wilson filed her state petition in the South Carolina Supreme Court's original jurisdiction in early November, 1997. South Carolina court rules require a party seeking to invoke the high court's original jurisdiction to file a petition and a complaint stating their requested relief. S.C.A.C.R. 229(b). Once notified of the petition, a respondent has twenty (20) days to respond. Id. at 229(c). Accordingly, the South Carolina Supreme Court could not properly consider the matter before the state's response near the end of November. The Supreme Court denied Wilson's petition on December 29, 1997. It is highly unlikely that, in this short span of time, the state's highest court considered the substantive issues and voluminous records, including the new evidence, involved in Wilson's claims. When considering its ability to grant habeas writs through its original jurisdiction, the South Carolina Supreme Court often details its reasoning. See, e.g. Key v. Currie, 305 S.C. 115, 406 S.E.2d 356 (1991) (denying writ petition because no "extraordinary reason" existed); *Butler v. State*, 302 S.C. 466, 397 S.E.2d 87 (1990) (granting writ petition where facts involved were "shocking to the universal sense of justice"). The one-sentence denial of Wilson's petition shows the state did not consider the merits of her claim in light of the new evidence. [FN9]

> FN9. A federal habeas petitioner may overcome a state's procedural default "by demonstrating cause for failing to adhere to a state procedural requirement and prejudice resulting from that failure, or by establishing actual innocence." Brooks, 984 F.Supp. at 948 (citing *Coleman*, 501 U.S. at 750; Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)). Wilson has not argued that she has a justifiable cause for not following South Carolina's procedural rules and that she was prejudiced by that failure. Furthermore, she does not claim to be actually innocent of the drug charges at the heart of this case. Therefore, this court finds that Wilson may not overcome the Supreme Court of South Carolina's procedural disposal of her state writ of habeas corpus.

The above analysis instructs the court that Wilson failed to properly

present her new evidence to the South Carolina courts. However, evidence not presented to state courts may come before a federal habeas court if certain conditions are met.

2. Federal Evidentiary Hearing

[4] Under AEDPA, federal courts presiding over habeas petitions from state prisoners must normally presume that all factual findings in the prior state proceedings are correct. 28 U.S.C. § 2254(e)(1); Ward, 989 F.Supp. at 759-60. When considering habeas petitions:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
> (A) the claim relies on--
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> *791 (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id. at § 2254(e)(2). It is clear that section "2254(e)(2) is designed to restrict the development of facts in federal habeas proceedings that were not known to or considered by a state court." Cardwell v. Netherland, 971 F.Supp. 997, 1011 (E.D.Va.1997). In restricting such facts, the statute "must only apply to a subset of applicants seeking to introduce new evidence in federal court." Id. One seeking to admit new evidence " 'fails' when he does not take or seek the opportunity to develop evidence in a state court proceeding." Id. By contrast, "an applicant does not 'fail' where he seeks, but is denied, the opportunity to develop facts in state court." Id. Thus, Wilson's attempt to introduce the new evidence hinges on whether she properly attempted to introduce the same in her state court proceedings.

The court cannot consider Wilson's new evidence because she did not

seek to submit it to the South Carolina courts at the appropriate time. Wilson's claim before this court does not rely on a retroactive application of new constitutional law. See 28 U.S.C. § 2254(e)(2)(A)(i). Also, the new evidence is not the type that "could not have been previously discovered through the exercise of due diligence." Id. at § 2254(e)(2)(A)(ii). As painstakingly depicted above, Wilson had an opportunity to present all of her evidence when she first argued her claims before the state PCR court. Her efforts to circumvent the strict state and federal procedural rules governing habeas corpus cases have failed. Therefore, this court cannot consider Wilson's new evidence.

C. Respondent's Summary Judgment Motion

1. Summary Judgment Standard

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A disputed fact is "material" if it might affect the outcome of the lawsuit under governing law. Id. A court must view the facts and inferences to be drawn in the light most favorable to the nonmoving party. Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir.1990).

2. Sixth Amendment Right to Counsel

Nothing in her state court proceedings violated Wilson's constitutional right to counsel. [FN10] The Sixth Amendment to the United States Constitution "guarantees criminal defendants the right to effective assistance of counsel, including the right to representation free from conflicts of interest." Gilbert v. Moore, 134 F.3d 642, 652 (4th Cir.1998)) (citing Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A counsel is ineffective if: (1) his performance was deficient, or fell below an objective standard of reasonableness; and (2) that this deficient performance prejudiced his client's case so that the criminal defendant was deprived of a fair trial.

Strickland, 466 U.S. at 687-688. Furthermore, Wilson's right to effective assistance of counsel, including the right to conflict-free representation, is subject to waiver. Gilbert, 134 F.3d at 652-53. Wilson's claim is judged under these standards.

> FN10. The court fully endorses the Magistrate Judge's exposition of the federal case law on a criminal defendant's right to counsel. See (Mag. Judge's Rep. & Rec. at 10-27.) The Magistrate Judge correctly applied this law to the facts of Wilson's case. The court will only briefly review the major rules of law in its opinion.

a. Strickland Test

[5][6] Wilson's allegation that her counsel was ineffective fails under the analysis outlined in the Strickland opinion. Wilson claims her counsel was ineffective due to a conflict of interest that arose from his joint *792 representation of her and her husband. Joint representation is not a per se violation of the constitutional right to effective counsel. Id. at 652. However, a federal habeas corpus petitioner can prevail in an effective assistance of counsel claim by "demonstrating the existence of an actual conflict of interest." Id. (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). The petitioner must do this by showing: (1) her interests parted with her attorney's due to a material fact, a legal issue, or a course of action; and (2) "that the conflict adversely affected [her] attorney's performance." Gilbert, 134 F.3d at 652. Under the Strickland analysis, if the petitioner proves these two elements, "prejudice is presumed and [she is] entitled to habeas relief." Id. Wilson fails under this test to show her attorney suffered from an actual conflict of interest.

[7] Wilson's attorney, Strickler, always maintained Wilson's interests in his representation at her trial. Wilson and her husband retained one attorney due to the obvious strategic benefits. Strickler testified that the Wilsons "were hanging together on this as did everyone else involved in the case." (Mag. Judge's Rep. & Rec. at 14-15.) Wilson now argues that Strickler's joint representation arrangement hindered his ability to negotiate a proper plea agreement and that Stickler failed to notify the state of Wilson's "true status" as an abused spouse. (Pet. for Habeas

Corpus at 7-9.)

Wilson testified to the PCR court that her attorney negotiated a plea agreement with the state's prosecutors on her behalf. (Mag. Judge's Rep. & Rec. at 19.) However, according to Strickler's testimony, Wilson rejected all offers to plead guilty that involved her serving any time in prison. (Id. at 20.) Based on the state's record of her case, this was an unreasonable position for Wilson to take. (Id. at 16-18) (documenting Wilson's "significant involvement in the [drug] conspiracy.") Therefore, Wilson's failure to secure a proper plea bargain was caused by her own unreasonable demands, not an alleged conflict of interest by her attorney. Accordingly, Strickler always conducted Wilson's defense with her interests foremost in mind. [FN11]

> FN11. Furthermore, even if Wilson could show that Strickler did depart from her interests, she cannot show that his performance was "adversely affected." Gilbert, 134 F.3d 642, 652-53. The United States Court of Appeals for the Fourth Circuit has repeatedly affirmed that an attorney's joint representation of family members does not create a conflict of interest and does not affect the attorney's ability to properly represent his clients. See, e.g., United States v. Ramsey, 661 F.2d 1013, 1019- 20 (4th Cir.1981), cert. denied sub. nom, Ramsey v. United States, 455 U.S. 1005, 102 S.Ct. 1642, 71 L.Ed.2d 874 (1982); United States v. Gilliam, 835 F.Supp. 288, 290-291 (W.D.Va.1993), aff'd, 34 F.3d 1067 (1994). The facts before the court do not warrant departing from this precedent and the conclusion of the Magistrate Judge.

Strickler also did not fail to account for Wilson's marital status. Wilson admits that Strickler, at most, knew that "there was some degree of disharmony in the [Wilsons'] marriage." (Pet.'s Objs. to the Mag. Judge's Rep. & Rec. at 11-12.) Strickler testified about the Wilsons' marital problems at the PCR hearing. (Id. at 12.) Wilson argues that Strickler's failure to act upon this knowledge demonstrates his inability to provide her with effective counsel. Wilson is wrong. In similar cases, federal appellate courts have found no conflict of interest existed between the defendant and her attorney.

In United States v. Acty, 77 F.3d 1054 (8th Cir.), cert. denied, --- U.S. ----, 117 S.Ct. 189, 136 L.Ed.2d 127 (1996), the defendant argued that an attorney's joint representation of her and her husband, "along with the couple's marital difficulties, gave rise to competing interests between the two defendants." Id. at 1057. Based on these allegations, the court found no conflict existed and that the defendant had competent counsel. The Eighth Circuit reasoned:

> The [husband and wife] were unified in their defense throughout the early pretrial stages.... While it is evident the couple was experiencing marital difficulties at that time, nothing in the record indicates that the marital problems were related to disagreements over either party's [defense] or over trial strategy.

Id. Similarly, Strickler's representation of Wilson was not compromised by the revelation *793 of any marital problems. This was the conclusion of the PCR court and the Magistrate Judge. This court will not disturb that decision.

b. Waiver

[8][9] Even if Wilson had some articulable claim for ineffective counsel based on her joint representation arrangement, she waived this right before the South Carolina courts. "To establish in habeas corpus a deprivation of [her] constitutional right to effective assistance of counsel, Petitioner [ ] must show that [she] did not intentionally, knowingly, and voluntarily relinquish this right." Gilbert, 134 F.3d at 653. After a thorough review of her rights as a criminal defendant by the trial court, Wilson expressed a desire to waive any conflict prior to trial. (Mag. Judge's Rep. & Rec. at 23.) She followed this assent to joint representation by signing a waiver of conflict form. (Id.) As noted by the Magistrate Judge, the PCR court found "that the petitioner was advised both by counsel and the court of the hazards of joint representation and 'executed a waiver of any conflict of interest.' " (Id. at 22) (quoting the PCR court.) Such factual findings by a state tribunal are presumed correct by this court. 28 U.S.C. § 2254(e)(1) (1997). Wilson has failed to rebut these findings by "clear and convincing evidence." Id. Therefore, the court finds that Wilson did waive her right to conflict-free counsel.

III. CONCLUSION

Wilson's claim for ineffective assistance of counsel fails as a matter of law. The record before the court cannot support her allegations. Wilson was afforded myriad opportunities to articulate her claim in the South Carolina courts. She may not now retry her case in the federal system. In summary, the court finds guidance from an opinion of the United States Court of Appeals for the Fifth Circuit in a strikingly similar case. In denying a right to counsel claim, the Fifth Circuit wrote:

> [The defendant] was fully apprised of the dangers inherent in joint representation; she consented to the representation after the conflict was explained to her by both the court and her counsel; and [her attorney] expressed his reasonable belief that his dual representation would not affect his ability to represent [the defendant's] interests. As neither the defense of duress nor the defense of battered spouse was raised at trial--and, based on the record [at trial], it is far from certain whether facts exist that would even plausibly support the raising of either defense--we cannot say that [the attorney] was unreasonable in believing that his dual representation would not affect his ability to represent [the defendant]....
> The record before us indicates that there are precious few facts on which a defense counsel could credibly construct an argument that [the defendant] became involved in this [drug] operation and continued her involvement for a protracted period because she was under duress or was a battered spouse .... As such, we cannot say either that the joint representation in this case created an actual conflict or that, if it did, the conflict was sufficient to impugn the judicial system or render [the defendant's] trial inherently unfair, thereby making her right to conflict-free counsel unwaivable. To the contrary, it was waivable; she did waive it; and she did so knowingly, intelligently, and voluntarily.

United States v. Rico, 51 F.3d 495, 511-12 (5th Cir.1995). This court echoes this sentiment in the instant case.

Therefore, the court adopts the Magistrate Judge's Report and Recommendation and incorporates it herein. Accordingly, it is

ORDERED that Respondents' motion for summary judgment is granted.

IT IS SO ORDERED.